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Able Food Sdn Bhd v Open Country Dairy Ltd

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-653–11 OF 2019
LIZA CHAN JC
18 DECEMBER 2020

C *Civil Procedure — Service — Service of notice of writ out of jurisdiction — Whether defendant had no grounds to set aside service — Whether even if postal service mode used by Malaysian Consular officials was defective, the hand-delivered service by solicitors in New Zealand cured that defect — Whether letters to plaintiff from High Court Registry and Ministry of Foreign Affairs*
D *confirming service on defendant was sufficient to constitute 'certificate' under O 11 r 5 of the Rules of Court 2012 ('the ROC') — Whether nothing in ROC required the certificate to be in any particular form — Whether purpose of O 11 to ensure defendant had notice of claim made by plaintiff was achieved — Whether defendant acknowledged receipt of notice of writ and not suffered any substantial*
E *miscarriage of justice to warrant setting service aside — Whether factual matrix of case on assumption plaintiff's pleadings were true brought matter within jurisdiction of High Court of Malaya as the most appropriate forum to determine the dispute between the parties*

F The plaintiff, a Malaysian company, entered into seven contracts to buy instant whole milk powder from the defendant, a New Zealand ('NZ') company, for repackaging and sale. The plaintiff had fully paid the defendant for the purchases. Later, on discovering that a substantial part of the milk powder was defective and unusable, the plaintiff demanded for a refund of
G USD3,493,048.80 from the defendant but the demand was ignored. The plaintiff then filed the instant suit to recover the said sum plus general damages for loss of profit and loss of market. After obtaining leave of court to serve notice of the writ on the defendant in NZ, the plaintiff, pursuant to O 11 r 6(3) of the Rules of Court 2012 ('the ROC'), filed the relevant documents at the
H High Court Registry and requested that service be effected through the NZ government. Pursuant to O 11 r 6(6), the Registry sought the assistance of Malaysia's Ministry of Foreign Affairs which, in turn, instructed the Malaysian High Commission in Wellington, NZ, to serve the relevant documents on the defendant at the address which the defendant had all the while used in its
I dealings with the plaintiff. The Malaysian Consular Office ('MCO') in Wellington posted the notice of the writ to the defendant. The High Court Registry subsequently informed the plaintiff's solicitors that the service on the defendant ('the first service') had been done and enclosed a letter (together with a proof-of-posting receipt) from the MCO/Ministry of Foreign Affairs

confirming that fact. Out of abundance of caution, the plaintiff separately instructed its solicitors in NZ to serve the notice of the writ on the defendant. On discovering from a company search that the defendant had changed its address for service, the NZ solicitors served the notice of the writ by hand on the defendant at the new address ('the second service'). The defendant entered appearance to the suit and applied (vide encl 19) to: (a) set aside the service of the notice of the writ on the ground that it was not served in accordance with NZ law; and (b) challenge the jurisdiction of the High Court of Malaya to hear the suit on the ground that the plaintiff had contractually submitted to the exclusive jurisdiction of the NZ Courts and agreed that NZ law would govern all transactions between the parties.

The challenge to the service of the notice of the writ

Although the defendant formally acknowledged receipt of the notice of the writ, it maintained that the service of the same by the MCO by post did not comply with NZ law which required the service to have been done by hand to a director or employee of the company or by leaving the notice of the writ at the company's registered office or address for service. The defendant also contended that the plaintiff's failure to produce an 'official certificate' as evidence of service as required under O 11 r 5(5) of the ROC was fatal and that neither the letter from the High Court Registry nor the letters from the Ministry of Foreign Affairs or the MCO confirming the service could amount to an official certificate because they did not state that the document had been served on the defendant personally or in accordance with NZ law. The defendant argued that O 11 r 5(3) of the ROC was mandatory and as the notice of the writ was not served in accordance with NZ law, the service had to be set aside. The plaintiff, on the other hand, argued that any irregularity in the first service — which was denied — was cured by the second service and therefore no ground remained for the defendant to claim that the service was irregular.

The challenge to the court's jurisdiction

The defendant contended that the Malaysian High Court should not assume jurisdiction over the instant matter because the plaintiff had submitted to the exclusive jurisdiction of NZ Courts to determine any dispute between the parties and had also agreed that NZ law would govern the contracts. The aforesaid matters were contained in two 'foreign jurisdiction clauses' in the defendant's terms of trade ('TT') which the plaintiff agreed to when the contracts were entered into since each of the sales contracts signed by the plaintiff referred to the TT by way of an internet link which the plaintiff could have accessed at any time. The plaintiff, on the other hand, argued that the terms of the TT were never furnished to it before or at the time the contracts were entered into and that it had no knowledge about the same. The plaintiff asserted that the High Court in Malaysia had jurisdiction to try any action that fell under any of the 13 limbs under O 11 r 1(1) of the ROC and that the present action fell under paras (F) and/or (G) of that rule in that the contracts were made in Malaysia and the breach also occurred here. The plaintiff submitted that it was trite law that for the purposes of determining encl 19, the

court had to assume that all of the plaintiff's allegations in its statement of claim were true.

Held, dismissing encl 19:

(1) The defendant had no ground to set aside the service of the notice of the writ. Its contentions that the mode of service by post and the certificate were irregular was water under the bridge as any irregularity in the first service effected by the Consular authorities, if any, was cured by the second service on the defendant by the plaintiff's NZ solicitors at the defendant's latest address for service (see paras 45 & 73).

(2) The underlying purpose of O 11 of the ROC was to ensure that service was successful in bringing notice of the plaintiff's claim to the defendant and that the mode employed in doing so was not contrary to the law of the foreign jurisdiction. In the instant case, the defendant's NZ solicitors had admitted receipt of the notice of the writ even before the second service on the defendant was effected. The defendant was fully aware of the notice of the writ (see paras 72 & 75).

(3) The plaintiff did all that it could have done under the ROC to effect service of the notice of the writ on the defendant. There was no fundamental irregularity either in the service of the notice of the writ or in the certificate that went to its roots which O 1A and O 2 r 1(3) of the ROC could not cure; neither was any substantial miscarriage of justice caused to the defendant. Order 1A exhorted the court to have regard to the overriding interest of justice and not only to any technical non-compliance with the rules of court. Order 1A and O 2 r 1(3) of the ROC were eminently fit for application in the instant case as the essential purpose of the service, which was to notify the defendant of the claim made against it, had been achieved (see para 72).

(4) The court did not agree with the defendant's contention that the letter from the High Court Registry or from the Ministry of Foreign Affairs Malaysia stating that service had been effected on the defendant could not amount to a certificate confirming service under O 11 r 5. The High Court's decision in *Istana Securities Ltd v Roger Bogne* [2017] MLJU 2427, which was upheld by the Federal Court, held that as the form of an 'official certificate' was not prescribed in the ROC and the authenticity of the documents was not challenged (as was the case here also), the document came within the meaning of O 11 r 5(7) as long as service was effected in accordance with the law of the foreign jurisdiction. The defendant sought to impose an unduly stringent standard to have a prescribed mode and form of certificate with which a consular authority had to comply before it could be considered a 'document' within the meaning of O 11 r 5(5) and (7). The ROC did not prescribe any

mandatory form that the authorities had to abide by when they effected service (see paras 46, 54–57 & 61).

(5) There was no duty on the plaintiff to call expert evidence or to produce a formal opinion to confirm that service had been effected in accordance with NZ law as such a requirement did not exist in the ROC (see para 65).

(6) The High Court of Malaya was seized of jurisdiction over the instant matter by virtue of s 23(1)(a) and (c) of the Courts of Judicature Act 1964 as well as paras (F) and/or (G) under O 11 r 1(1) of the ROC. It was the most appropriate forum to hear the dispute between the parties given that: (a) the contract was made in Malaysia and the breach occurred in Malaysia; (b) all or most of the relevant witnesses and the evidence were within the jurisdiction of this court; (c) the plaintiff had already paid the defendant for the allegedly defective milk powder (weighing approximately 1,068,375 mt (more than 1 million kg)) and the court had to assume that the plaintiff's allegations in its statement of claim were true. And having paid such a huge sum, to make the plaintiff incur more costs to ship back the milk powder and fly its witnesses to NZ for trial there would be 'rubbing salt into the wound'. If the trial took place in Malaysia, the defendant would be put to expense but at least it already had USD3,493,048.80 of the plaintiff's money; (d) the laws concerning sale of goods and contract in Malaysia and in NZ were not materially different; and (e) the matter was assured of a speedy trial in Malaysia (see paras 89, 95 & 97).

(7) The court found that there was no consensus between the parties on the foreign law and jurisdiction clause contained in the defendant's terms of trade. Consequently, there was no question of any breach of that clause and/or of the court condoning a breach of the agreement between the parties. In the cases cited by the defendant, the foreign jurisdiction clause was clearly made part of the contract unlike in the instant case (see paras 93–94).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat Malaysia, memasuki tujuh kontrak untuk membeli susu tepung segera dari defendan, sebuah syarikat New Zealand ('NZ'), untuk pembungkusan semula dan penjualan. Plaintif telah membayar sepenuhnya kepada defendan untuk pembelian tersebut. Seterusnya, setelah mengetahui bahawa sebahagian besar susu tepung tersebut rosak dan tidak dapat digunakan, plaintif menuntut pengembalian semula wang sebanyak USD3,493,048.80 dari defendan tetapi tuntutan tersebut tidak diendahkan. Plaintif kemudiannya memfailkan tuntutan semasa untuk mendapatkan kembali jumlah tersebut dengan ganti rugi am kerana kehilangan keuntungan dan kehilangan pasaran. Setelah mendapat kebenaran mahkamah untuk

menyampaikan notis writ kepada defendan di NZ, plaintif, menurut A 11 k 6(3) Kaedah-Kaedah Mahkamah 2012 ('KKM'), memfailkan dokumen yang berkaitan di Pejabat Pendaftaran Mahkamah Tinggi dan memohon agar penyampaian dilaksanakan melalui kerajaan NZ. Menurut A 11 k 6(6), Pejabat Pendaftaran memohon bantuan Kementerian Luar Negeri Malaysia yang mana, selanjutnya, mengarahkan Suruhanjaya Tinggi Malaysia di Wellington, NZ, untuk menyampaikan dokumen-dokumen yang berkaitan kepada defendan di alamat tempat defendan telah biasanya digunakan dalam urusannya dengan plaintif. Pejabat Konsular Malaysia ('MCO') di Wellington menyampaikan notis writ tersebut kepada defendan. Pejabat Pendaftaran Mahkamah Tinggi kemudian memaklumkan peguamcara plaintif bahawa penyampaian kepada defendan ('penyampaian pertama') telah sempurna dan melampirkan surat (bersama dengan bukti-bukti pengeposan) dari MCO/Kementerian Luar Negeri yang mengesahkannya. Demi perhatian, plaintif secara berasingan mengarahkan peguamnya di NZ untuk menyampaikan notis writ tersebut kepada defendan. Setelah mengetahui dari carian syarikat bahawa defendan telah menukar alamatnya bagi penyampaian, peguamcara NZ menyampaikan notis writ tersebut sendiri kepada defendan di alamat baru melalui serahan tangan ('penyampaian kedua'). Defendan memasukan kehadiran terhadap tuntutan tersebut dan memohon (melalui lampiran 19) untuk: (a) mengetepikan penyampaian notis writ tersebut dengan alasan bahawa ia tidak disampaikan berdasarkan undang-undang NZ; dan (b) mencabar bidang kuasa Mahkamah Tinggi Malaya untuk mendengar tuntutan tersebut dengan alasan bahawa plaintif telah secara kontrak bersetuju kepada bidang kuasa eksklusif Mahkamah NZ dan bersetuju bahawa undang-undang NZ akan mendengar kesemua transaksi antara pihak-pihak.

Mencabar penyampaian notis tersebut

Walaupun defendan secara rasmi mengakui penerimaan notis writ tersebut, pihaknya menyatakan bahawa penyampaiannya oleh MCO melalui pos tidak mematuhi undang-undang NZ yang memerlukan penyampaiannya dilakukan secara serahan tangan kepada pengarah atau pekerja syarikat atau dengan meninggalkan notis writ tersebut di pejabat berdaftar syarikat atau alamat untuk penyampaian. Defendan juga berpendapat bahawa kegagalan plaintif untuk mengemukakan 'sijil rasmi' sebagai bukti penyampaian sebagaimana yang diperuntukan di bawah A 11 k 5(5) KKM adalah fatal dan bahawa surat dari Pejabat Pendaftar Mahkamah Tinggi atau surat-surat dari Kementerian Hal Ehwal Luar Negeri atau MCO yang mengesahkan bahawa penyampaian tersebut terjumlah kepada sijil rasmi kerana ia tidak menyatakan bahawa dokumen tersebut telah disampaikan kepada defendan secara peribadi atau berdasarkan undang-undang NZ. Defendan berpendapat bahawa A 11 r 5(3) KKM adalah mandatori dan oleh kerana notis writ tidak disampaikan berdasarkan undang-undang NZ, penyampaian tersebut harus diketepikan. Plaintif, sebaliknya, berpendapat bahawa sebarang kecacatan dalam penyampaian pertama — yang mana dinafikan — telah dibaikpulih oleh penyampaian kedua dan oleh itu tidak ada alasan bagi defendan untuk

mendakwa bahawa penyampaian tersebut tidak teratur.

Mencabar bidang kuasa mahkamah

Defendan berpendapat bahawa Mahkamah Tinggi Malaysia tidak boleh mengambil alih bidang kuasa dalam hal semasa kerana plaintif telah bersetuju kepada bidang kuasa eksklusif Mahkamah NZ untuk menentukan sebarang pertikaian antara kedua-dua pihak dan juga telah bersetuju bahawa undang-undang NZ akan menentukan kontrak. Perkara-perkara di atas terkandung dalam dua 'klausa bidang kuasa asing' dalam syarat perdagangan defendan ('SP') yang dipersetujui oleh plaintif apabila kontrak tersebut dimasuki kerana setiap kontrak penjualan yang ditandatangani oleh plaintif merujuk kepada SP dengan cara pautan internet yang boleh diakses oleh plaintif pada bila-bila masa. Plaintif, sebaliknya berpendapat bahawa syarat-syarat SP tidak pernah diberikan kepadanya sebelum atau pada masa kontrak dimasuki dan bahawa ia tidak mempunyai pengetahuan mengenai perkara tersebut. Plaintif menegaskan bahawa Mahkamah Tinggi di Malaysia mempunyai bidang kuasa untuk mengadili sebarang tindakan di bawah mana-mana 13 cabang di bawah A 11 k 1(1) KKM dan bahawa tindakan semasa berada di bawah perenggan (F) dan/atau (G) kaedah yang mana kontrak tersebut dibuat di Malaysia dan pelanggaran tersebut juga berlaku di sini. Plaintif berpendapat bahawa ia adalah undang-undang yang mantap bahawa untuk tujuan menentukan lampiran 19, mahkamah harus menganggap bahawa kesemua dakwaan plaintif dalam pernyataan tuntutannya adalah benar.

Diputuskan, menolak lampiran 19:

(1) Defendan tidak mempunyai alasan untuk mengetepikan penyampaian notis writ tersebut. Pendapatnya bahawa cara perkhidmatan melalui pos dan sijil perakuan tidak teratur adalah sia-sia kerana sebarang ketidakaturan dalam penyampaian pertama yang dibuat oleh pihak berkuasa Konsular, sekiranya ada, dibaikpulih oleh penyampaian kedua ke atas defendan oleh peguamcara NZ plaintif di alamat terkini defendan bagi penyampaian tersebut (lihat perenggan 73 & 45).

(2) Asas tujuan A 11 KKM adalah untuk memastikan bahawa penyampaian tersebut sempurna memberikan makluman tuntutan plaintif terhadap defendan dan cara yang digunakan untuk melakukannya tidak bertentangan dengan undang-undang bidang kuasa asing. Dalam kes semasa, peguamcara NZ defendan telah mengakui penerimaan notis writ tersebut sebelum penyampaian kedua terhadap defendan dilaksanakan. Defendan mengetahui sepenuhnya notis writ tersebut (lihat perenggan 72 & 75).

(3) Plaintif melakukan kesemua yang dapat dilakukannya di bawah KKM untuk melaksanakan penyampaian notis writ tersebut kepada defendan. Tidak ada ketidakaturan yang terdasar sama ada dalam penyampaian

notis writ atau sijil perakuan ke akarnya yang tidak dapat dibaikpulih oleh A 1A dan A 2 k 1(3) KKM; juga tidak terjadi ketidakadilan yang besar terhadap defendan. Aturan 1A menggesa mahkamah agar memperhatikan kepentingan keadilan yang lebih tinggi dan bukan hanya pada ketidakpatuhan teknikal terhadap keadah mahkamah. Aturan 1A dan A 2 k 1(3) KKM sangat bersesuaian untuk digunapakai dalam kes semasa kerana tujuan penting penyampaian tersebut, aitu untuk memaklumkan kepada defendan tentang tuntutan yang dibuat terhadapnya, telah dicapai (lihat perenggan 72).

(4) Mahkamah tidak bersetuju dengan pendapat defendan bahawa surat dari Pejabat Pendaftar Mahkamah Tinggi atau dari Kementerian Luar Negeri Malaysia yang menyatakan bahawa penyampaian telah dilakukan terhadap defendan tidak terjumlah kepada sijil perakuan yang mengesahkan penyampaian di bawah A 11 k 5. Keputusan Mahkamah Tinggi dalam *Istana Securities Ltd v Roger Bogne* [2017] MLJU 2427, yang disahkan oleh Mahkamah Persekutuan, memutuskan bahawa sebagai bentuk 'sijil perakuan rasmi' tidak ditetapkan dalam KKM dan kesahihan dokumen tersebut tidak dicabar (seperti halnya di sini juga), dokumen tersebut berada dalam erti A 11 k 5(7) asalkan penyampaian dilaksanakan bersesuaian dengan undang-undang bidang kuasa asing. Defendan memohon untuk memaksakan menggunapakai standard yang sangat ketat untuk mendapatkan cara dan bentuk sijil perakuan yang ditetapkan yang harus dipatuhi oleh pihak berkuasa konsular sebelum dapat dianggap sebagai 'dokumen' dalam erti A 11 k 5(5) dan (7). KKM tidak menetapkan bentuk wajib yang harus dipatuhi oleh pihak berkuasa apabila mereka melaksanakan penyampaian (lihat perenggan 46, 54–57 & 61).

(5) Tidak ada keperluan bagi plaintif untuk memanggil keterangan pakar atau mengemukakan pendapat rasmi dalam memastikan bahwa penyampaian telah dilakukan sesuai dengan undang-undang NZ kerana peruntukan tersebut tidak wujud dalam KKM (lihat perenggan 65).

(6) Mahkamah Tinggi Malaya mempunyai bidang kuasa atas perkara semasa berdasarkan s 23(1)(a) dan (c) Akta Mahkamah Kehakiman 1964 serta perenggan (F) dan/atau (G) di bawah A 11 k 1(1) KKM. Ianya adalah forum yang paling tepat untuk mendengar pertikaian antara pihak-pihak berkenaan kerana: (a) kontrak tersebut dibuat di Malaysia dan pelanggaran tersebut berlaku di Malaysia; (b) kesemua atau sebahagian besar saksi yang berkaitan dan keterangan berada dalam bidang kuasa mahkamah ini; (c) plaintif telah membayar defendan untuk susu tepung yang didakwa rosak (dengan berat kira-kira 1,068,375 tan (lebih dari 1 juta kg)) dan mahkamah harus menganggap bahawa dakwaan plaintif dalam pernyataan tuntutannya adalah benar. Dan setelah membayar jumlah yang besar, untuk membuat plaintif menanggung lebih banyak

kos untuk mengembalikan susu tepung dan menerbangkan saksinya ke NZ untuk dibicarakan di sana, akan terus merugikan plaintif. Sekiranya perbicaraan dijalankan di Malaysia, defendan akan dibebankan tetapi sekurang-kurangnya ia sudah mempunyai USD3,493,048.80 wang plaintif; (d) undang-undang mengenai jualan barang dan kontrak di Malaysia dan di NZ tidak berbeza secara material; dan (e) perkara tersebut dijamin akan melalui perbicaraan pantas di Malaysia (lihat perenggan 89, 95 & 97).

(7) Mahkamah mendapati bahawa tidak ada persetujuan antara pihak-pihak berkenaan undang-undang asing dan klausa bidang kuasa yang terkandung dalam syarat perdagangan defendan. Akibatnya, tidak ada persoalan mengenai sebarang pelanggaran klausa tersebut dan/atau mahkamah membenarkan pelanggaran perjanjian antara pihak-pihak. Dalam kes-kes yang dirujuk oleh defendan, klausa bidang kuasa asing secara jelas menjadi sebahagian dari kontrak tidak seperti dalam kes semasa (lihat perenggan 93–94).]

Cases referred to

Abela and others v Baadarani [2013] 4 All ER 119, SC (refd)
Africa Express Line Ltd v Socofi SA and another [2010] 2 All ER (Comm) 1085, QBD (refd)
AIG Europe (UK) Ltd and others v The Ethniki [2000] 2 All ER 566, CA (refd)
Ajwa For Food Industries Co (Migop), Egypt v Pacific Inter-Link Sdn Bhd & another appeal [2011] MLJU 1537; [2013] 2 CLJ 395, CA (distd)
American Express Bank Ltd v Mohamed Toufic Al-ozeir & Anor [1995] 1 MLJ 160, SC (folld)
Atico Overseas Ltd v Procast Furniture Industry Sdn Bhd [2014] 1 MLJevi 15, HC (refd)
BNP Paribas (FKA Banque National De Paris) v Polynesia Timber Services Pte Ltd & Anor [2002] 4 SLR 933, HC (refd)
Commissioner of Inland Revenue v Compudigm International Ltd (in rec and in liq) [2011] NZCCLR 6, HC (refd)
Fiden Electrical Engineering Sdn Bhd v Nippon Seiko KK & Ors [2004] 7 MLJ 231, HC (refd)
Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad [1976] 2 MLJ 154, FC (refd)
Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another [2015] 4 SLR 625; [2015] SGHC 144, HC (refd)
Istana Securities Ltd v Roger Bogne [2017] MLJU 2427, HC (folld)
Joseph bin Paulus Lantip & Ors v Unilever Plc [2018] Supp MLJ 151, FC (refd)
Ma Boon Lan v UOB Kay Hian Pte Ltd (previously known as Kay Hian Pte Ltd) and another appeal [2013] 4 MLJ 848, CA (refd)
Matchplan (M) Sdn Bhd & Anor V William D Sinrich & Anor [2004] 2 MLJ

424 ; [2004] 1 CLJ 810, CA (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)
Moonlight Farms Trust Ltd v Powell Land Holding Ltd [2019] NZHC 861, HC (refd)
Nilai Lanjut Sdn Bhd v Yeng Chong Realty Bhd & Ors [2018] MLJU 2053, HC (refd)
Olafsson v Gissurarson (No 2) [2008] 1 WLR 2016, CA (refd)
Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor [2014] 6 MLJ 189, FC (refd)
Phillips and another v Symes and others (No 3) [2008] 1 WLR 180, HL (refd)
Redang Paradise Vacation Sdn Bhd v Yap Chuan Bin and other appeals [2017] 5 MLJ 35; [2017] 10 CLJ 296, CA (refd)
Rintis Malay Motors Sdn Bhd v Agasta Co Ltd [2017] MLJU 874, HC (refd)
Rockwell Automation (M) Sdn Bhd v Samtech Solutions Sdn Bhd [2018] MLJU 895, HC (refd)
Roger Bogne v Istana Securities Ltd [2018] 12 MLJ 152; [2018] 1 LNS 1461, CA (refd)
Westport Malaysia Sdn Bhd v Northern Democrats mbH & Co KG [2017] MLJU 236, HC (folld)
World Triathlon Corp v SRS Sports Centre Sdn Bhd [2019] 4 MLJ 394; [2019] 1 CLJ 381, CA (distd)

Legislation referred to

Civil Procedure Rules [UK] rr 3.10, 6.9, 6.15
Companies Act 1993 [NZ] ss 248(1)(c)(i), 387, 387(1), (1)(a), (1)(b), (1)(c), 388, 388(1)(b), 392(1)(a)
Courts of Judicature Act 1964 s 23(1)(a), (1)(c)
Delegation of Powers Act 1956 s 6(1)
Evidence Act 1950 s 45
Interpretation Acts 1948 and 1967 ss 3, 93(2)
Rules of Court [SG] O 11
Rules of Court 2012 O 1A, O 2 rr 1, 1(3), 3, O 10 rr 1(1), (4), 4, O 11, O 11 rr 1, 1(F), (G), 3, 5, 5(3), (5), (6), (7), 6, 6(3), (6), 7, O 12 rr 10(1), (1)(a), (1)(b), (2), O 14 r 2(1), O 32 r 1, O 62 r 14, Form 10
Sales of Goods Act 1957 ss 15, 16

Richard Kok (Tan Ko Xin with him) (Rizha & Richard) for the plaintiff.
Alvin Julian (Long Mohd Noor Adman with him) (Zaid Ibrahim & Co) for the defendant.

Liza Chan JC:

INTRODUCTION

[1] Enclosure 19 is the defendant's notice of application dated 8 July 2020 to set aside the service of the notice of writ dated 23 December 2019 as well as to challenge the jurisdiction of the courts in Malaysia to hear the dispute pursuant to O 12 r 10(1) and/or (2) of the Rules of Court 2012 ('the ROC 2012') and/or the inherent jurisdiction of the court.

[2] The relevant cause papers are as follows:

(a) the defendant's notice of application dated 8 July 2020 ('encl 19');

(b) the defendant's affidavit in support dated 1 July 2020 ('the defendant's affidavit 1');

(c) the plaintiff's affidavit in reply dated 27 July 2020 ('the plaintiff's affidavit 1');

(d) the defendant's affidavit in reply dated 12 August 2020 ('the defendant's affidavit 2');

(e) the plaintiff's affidavit in reply No 2 dated 1 September 2020 ('the plaintiff's affidavit 2');

(f) the plaintiff's affidavit of service affirmed on 29 September 2020; and

(g) the defendant's affidavit in reply No 2 affirmed on 2 October 2020.

BACKGROUND

[3] The plaintiff is a Malaysian incorporated company in the business of manufacture and supplies of milk powder internationally.

[4] The defendant is a New Zealand company in the business of producing, supplying and exporting New Zealand dairy products including milk powder.

[5] The plaintiff was a customer of the defendant until this dispute.

[6] Sometime on or about August 2016, the plaintiff started purchasing instant whole milk powder ('IWMP') from the defendant for reselling as consumable instant whole milk powder.

[7] According to the plaintiff, the salient, express and/or implied terms of the seven purchases ('seven contracts') were the same and they are as follows:

(a) the descriptions of the milk powder are as follows:

A (i) physical properties: light cream in colour, free flowing powder;

(ii) flavour and odour: sweet desirable flavour, free from undesirable flavour; and

(iii) expiration dates: two years from production dates.

B (b) pursuant to s 15 of the Sales of Goods Act 1957, it is an implied condition in all the seven contracts that the milk powder shall correspond with its descriptions;

C (c) pursuant to s 16 of the Sales of Goods Act 1957, it is an implied condition in all the seven contracts that the milk powder should be reasonably fit for the purposes for which the plaintiff purchased it; and

(d) it is also an implied condition in all the seven contracts that the milk powder shall be of merchantable quality.

D

[8] According to the plaintiff, amongst the purchases, were seven purchases, which had been fully paid by the plaintiff but were unconsumable.

[9] The plaintiff discovered that a substantial part of the milk powder were E defective. They suffer caking, poor solubility, poor wettability, discolouration, off odour, off flavour, high moisture content, colour turned brownish and separation despite being described to have a shelf life of two years from production dates under the contract.

F **[10]** The plaintiff lodged complaints to the defendant on five occasions, namely on 16 May 2017, 15 January 2018, 22 January 2018, 17 July 2018 and 29 April 2019 whenever defects were discovered.

G **[11]** The plaintiff had allegedly paid USD4,652,714.04 for all the seven contracts. The defective portion of the milk powder amounted to USD3,493,048.80.

[12] By letter dated 1 July 2019, the plaintiff demanded against the H defendant the sum of USD3,493,048.80 but the demand was ignored.

[13] On 19 November 2019, the plaintiff filed this suit against the defendant claiming the sum of USD3,493,048.80, general damages for loss of profit and loss of market, interest and costs.

I

[14] On 25 June 2020, the defendant entered appearance to this suit. On 8 July 2020, the defendant filed encl 19.

[15] I now move on to consider the issues in the application, namely:

(a) whether the notice of the writ should be set aside on the ground that the said notice of the writ was not served in accordance with the laws of New Zealand; and

(b) whether the Malaysian courts should not assume jurisdiction over this dispute as there is allegedly an express choice of jurisdiction clause in the relevant contract(s).

WHETHER THE NOTICE OF THE WRIT SHOULD BE SET ASIDE ON THE GROUND THAT THE SAID NOTICE OF THE WRIT WAS NOT SERVED IN ACCORDANCE WITH THE LAWS OF NEW ZEALAND

The defendant's contentions

[16] The defendant's counsel argued that the notice of the writ should be set aside because the service of the notice of the writ was not done in accordance with the laws of New Zealand.

[17] Counsel pointed out that the jurisdiction for setting aside a service of the notice of writ is found in O 12 r 10(1)(a) and (b) of the ROC 2012 whilst the law governing service of a notice of writ abroad is contained in O 11 r 5 of the ROC 2012. The notice of the writ according to him, must either be served personally or be served in accordance with the law of the country where service is effected according to these provisions read together.

[18] Counsel submitted that O 11 r 5(5) and (6) provides that an official certificate that states that the notice of a writ has been served personally, or in accordance with the laws of the country where service is effected shall be evidence of that fact. The said certificate must be from the Minister and shall be evidence that the notice of the writ has been duly served until the contrary is proven.

[19] Counsel submitted that service of a notice of writ must be served in accordance with the laws of the country where service is effected and failure to do so is a ground to set aside the said service. He referred to the case of *Fiden Electrical Engineering Sdn Bhd v Nippon Seiko KK & Ors* [2004] 7 MLJ 231, where the High Court ruled that as the method of service was not in accordance with Japanese law, there was failure to comply with O 11 r 5 of the ROC 2012, hence, the service of process was set aside. Abdul Malik Ishak J (as he then was) held:

> [76] The plaintiff who files the civil suit within the jurisdiction of Malaysia on the intended first defendant in Japan pursuant to the law of Japan must follow the following procedure. *There must be compliance with the law of Japan and in order to*

comply with the law of Japan, service must be effected on the first defendant through the Tokyo District Court, by special mail service and through the Japanese Supreme Court.

[77] *Since Malaysia is not a signatory to the Civil Procedure Convention, the only one recognised mode of service is through the Tokyo District Court, by special mail and through the Japanese Supreme Court as stipulated in the Japanese Law* — referring to the Law Relating To The Reciprocal Judicial Aid To Be Given At The Request Of Foreign Court (Law No 63 of the 38th year of Meiji (13 March, 1905), as amended by Law No: 7 of the 45th year of Meiji (29 March, 1912) and by Law No: 17 of the 13th year of Showa (22 March, 1938)), as well as the Japanese Code – referring, of course, to The Code Of Civil Procedure (Law No 109, June 26, 1996).

[78] Now, *since the procedure in which service was effected on the first defendant in Japan conflicts with the law of Japan, O11 r 6(2)(b) of the RHC and O11 r 5(2) of the RHC have not been complied with. Consequently, in my judgment, the service of process on the first defendant has not complied with the laws regulating service in Japan and Malaysia and, accordingly, I must set it aside.*

[20] Counsel referred to an opinion of New Zealand solicitors (exh APM5 of the defendant's affidavit in support) and added that according to New Zealand law the service of the notice of writ must comply with s 387 of the New Zealand Companies Act 1993 which stipulates:

387 Service of documents on companies in legal proceedings

(1) *A document, including a writ, summons, notice, or order, in any legal proceedings may be served on a company as follows*:

(a) *by delivery to a person named as a director of the company on the New Zealand register*; or

(b) *by delivery to an employee of the company at the company's head office or principal place of business*; or

(c) by leaving it at the company's registered office or address for service; or

(d) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or

(e) in accordance with an agreement made with the company; or

(f) by serving it at an address for service given in accordance with the rules of the court having jurisdiction in the proceedings or by such means as a solicitor has, in accordance with those rules, stated that the solicitor will accept service.

(2) The methods of service specified in subsection (1) are the only methods by which a document in legal proceedings may be served on a company in New Zealand.

[21] Counsel said the New Zealand solicitor's opinion states that mailing legal proceedings by ordinary post is not deemed to be 'delivery' or 'leaving'

under s 387(1)(a)–(c) of the Companies Act 1993. The opinion thereafter referred to the case of *Moonlight Farms Trust Ltd v Powell Land Holding Ltd* [2019] NZHC 861 where the New Zealand courts have held that service by post does not comply with s 387(1) of the Companies Act 1993 as follows:

> [28] While a well thought out means of addressing the service issue, I cannot accept Mrs Houghton's submission. *To do so would in a practical sense make service by post an acceptable means of service under s 387 of the Act*. Comparing s 387 with s 388 of the Act confirms that service by post is not an acceptable means of service under s 387 ...

[22] Apart from the above, counsel added that the opinion by the New Zealand solicitors further states that delivery to a person named as a director under s 387(1)(a) and an employee under s 387(1)(b) are service to a natural persons which are required to be done in accordance with s 392(1)(a) of the Companies Act 1993 which reads:

> 392 Additional provisions relating to service
>
> (1) Subject to subsection (2), for the purposes of sections 387 to 391 —
>
> (a) If a document is to be served by delivery to a natural person, service must be made —
>
> (i) by handing the document to the person; or
>
> (ii) if the person refuses to accept the document, by bringing it to the attention of, and leaving it in a place accessible to, the person:
>
> ...
>
> (2) A document is not to be deemed to have been served or sent or delivered to a person if the person proves that, through no fault on the person's part, the document was not received within the time specified.

[23] Counsel contended that in the instant case, the notice of the writ was served by post which was posted by the Malaysian High Commission at Wellington. As the court documents were only served by way of post to the defendant, service does not comply with s 387 of the New Zealand Companies Act 1993.

[24] Counsel also said that the notice of the writ was also not left at Open Country Dairy Ltd's registered office or delivered to any of the company's directors or employees at the head office as required by s 387 of the New Zealand Companies Act 1993.

[25] Counsel submitted that the plaintiff has failed to discharge its burden to comply with O 11 rr 5(5) and (6) of the ROC 2012 when the plaintiff argued that service of the notice of the writ has been successfully served via a letter

dated 2 July 2020 from the High Court which enclosed a letter from the Ministry of Foreign Affairs Malaysia dated 26 June 2020.

[26] Counsel, in support of his argument, relied on the case of *Roger Bogne v Istana Securities Ltd* [2018] 12 MLJ 152; [2018] 1 LNS 1461, where the Court of Appeal held that an email from the High Commission of Malaysia in Pretoria did not amount to a certificate as the email did not state whether the notice of writ was served personally or was served accordance to the laws of the country where service was effected. Counsel said the burden lies on the plaintiff to prove that service under O 11 r 5(5) of the ROC 2012 has been complied with. The relevant paragraphs of the judgment are:

> [32] *In the grounds of judgment, the learned judge agreed with the requirement of official certificate under O 11 r 5(5) of the ROC as evidence of service of the documents on the defendant. The plaintiff in this case did not produce a certificate. It produced an email from the High Commission of Malaysia in Pretoria. With regard to this issue, we noted that the learned judge chose to place the burden on the defendant to challenge the authenticity of the said email.* The learned judge held that the Form of certificate by a consular officer is not prescribed in the ROC 2012. As the authenticity of the email is not challenged, therefore, he did not see why it cannot amount to a certificate by the consular officer in question. In other words, the learned judge accepted the submission of the plaintiff that the email is the 'official certificate' as mention in O 11 r 5(5) of the ROC.
>
> [33] The email dated 9 July 2015 from Zaharizal Zainol, the 3rd Secretary in Pretoria contains the following message:
>
> > Sukacita dimaklumkan bahawa dokument saman berkaitan telah berjaya disampaikan ke alamat defendan seperti yang tertera. Untuk makluman, defendan tidak berada di rumah ketika dokumen tersebut diserahkan kerana keluar bekerja. Namun salah seorang daripada ahli keluarga beliau telah menerima bagi pihak defendan dokumen yang diserahkan.
>
> [34] The learned judge held that the email amounts to a certificate. He based his decision on O 11 r 5(7) of the ROC 2012, which states that a document purporting to be such a certificate as is mentioned in para (5) or (6) shall, until the contrary is proved, be deemed to be such a certificate.
>
> [35] *We did not agree with the learned judge' view. His decision in the court below fell into error in making this finding. In our view, there is a blatant disregard of the words 'official certificate' as provided under O 11 r 5(5) of the ROC. One of the ways to prove that service was affected in accordance with the law of the country in which service is affected is to produce a certificate to that effect. It must have been the intention of the Rule Committee to provide for official certificate as proof of service was affected in accordance with the law of the country. Oxford Advanced Learner's Dictionary defined 'certificate' as an 'official document that may be used to prove that the facts is stated are true'. Osborn's Concise Law Dictionary, 6th Ed defined 'certificate' as 'a statement in writing by a person having a public or official status concerning some matter within his knowledge or authority'. Obviously, the email is not the official document.*

[36] ... Our view is that, an official certificate stating that a notice of a writ as regards which r 6 has been complied with has been served on a person personally, or in a accordance with the law of the country in which service was affected must be produced as evidence of the facts so stated.

[37] We are of the view that the said email dated 9 July 2015 is not the official certificate mentioned in O 11 r 5(5) of the ROC 2012. *The email or document was not certified and signed to state that service was effected in accordance with the law of South Africa.*

[38] We do not agree with the learned judge that the email is deemed as the certificate. Our view is that the email does not state:

(i) *that the notice of writ was served personally; or*

(ii) *that the notice of writ was served in accordance with the law of South Africa.*

[42] *The failure to state in the email that the service was affected was in accordance with the law of South Africa in our view is fatal.* We also agreed with the defendant that no expert evidence was led by the plaintiff to show that despite this absence of a certificate confirming that service was effected in accordance with the law of South Africa that the service was in fact done in accordance with the law there.

[43] *The learned judge erred in placing the burden on the defendant to prove that services was not done in accordance with the law in South Africa. The burden only shifts to the defendant once the plaintiff complies with O 11 r 5(5) of the ROC and produces a document from any one of the authorities mentioned in r 5(5)(a)–(c), stating*:

(i) *that the notice of writ has been served on a person personally; or*

(ii) *that the notice of writ has been served in accordance with the law if the country in which service was effected (in this case, the law of South Africa).*

[44] The email provides neither one of the two alternative confirmations required. Our view is that the email cannot be said to be a document which purports to be an *O 11 r 5(5) certificate. The Service of the notice of writ was irregular.*

[27] Based on the above judgment, counsel submitted that the plaintiff here has failed to discharge its burden because no certificate in accordance with O 11 r 5(5) of the ROC 2012 was produced. The letter dated 2 July 2020 from the High Court or the letter from the Ministry of Foreign Affairs Malaysia dated 26 June 2020 cannot amount to a certificate as the letters:

(a) do not state that the notice of writ has been served on the defendant personally;

(b) do not state that the notice of writ has been served in accordance with the laws of New Zealand; and

(c) was not signed by the Minister.

[28] Counsel contended that presently, there is not a single shred of evidence that proves service of the notice of writ was done in accordance with laws of New Zealand. Quite apart, there is an email dated 26 June 2020 from one Nor Azme Salleh to Ihtisyam Abd Wahab stating that the service of the court documents was effected by way of New Zealand post on 29 April 2020 (see exh OTH10 of plaintiff's affidavit in reply). As such, the email by Nor Azme Salleh evidently confirmed that the notice of writ was served by way post and this method of service is in contravention of s 387 of the New Zealand Companies Act 1993.

[29] Counsel concluded that the provisions of O 11 r 5(3) of the Rules of Court 2012 are mandatory and as the notice of writ was not served in accordance with the laws of New Zealand, and referring to *Fiden Electrical Engineering Sdn Bhd v Nippon Seiko KK & Ors*, the notice of writ should be set aside.

The plaintiff's contentions

[30] The plaintiff argued that there are no valid grounds to set aside the notice of the writ as follows.

[31] Counsel for the plaintiff said that after its application in encl 4 for leave to serve a notice of the writ to the defendant in New Zealand was allowed by the court on 4 December 2019, it proceeded to file the notice of writ and the request for service of documents abroad dated 23 December 2019 which followed Form 10 of the Rules of Court 2012 for service through the Government of New Zealand. It reads:

> I hereby request that the notice of writ in this action be sent through the proper channel to New Zealand for service on Open Country Dairy Limited, at Building A, Ground Floor, 52 Highbrook Drive East Tamaki, Auckland 2013, New Zealand or elsewhere in New Zealand and that it may be served through the government of New Zealand.

[32] On 2 January 2020, the plaintiff lodged the request with the High Court Malaya Registry in accordance to O 11 r 6(3) of the Rules of Court 2012 as evident from exh OTH17 of the plaintiff's affidavit 2.

[33] The plaintiff said:

(a) on 30 January 2020, it received a carbon copy of the letter from the High Court Registry to the Ministry of Foreign Affairs, Malaysia requesting them to forward the Cause Papers to New Zealand; and

(b) on 9 July 2020, the plaintiff received a letter from the High Court Registry dated 2 July 2020 ('letter dated 2 July 2020') stating that the service on the defendant in Auckland, New Zealand has been successfully completed:

> Sukacita dimaklumkan bahawa penyampaian dokumen mahkamah kepada defendan yang beralamat di Auckland, New Zealand telah berjaya disempurnakan oleh pihak Suruhanjaya Tinggi Malaysia di Wellington, New Zealand.

[34] Counsel said in the letter dated 2 July 2020, the High Court Registry enclosed various documents including a letter from the Ministry of Foreign Affairs, Malaysia dated 26 June 2020 certifying the completion of the service on the defendant ('the first service') see: exh OTH10 of the plaintiff's affidavit 1.

[35] Counsel further said on 17 June 2020, the defendant's solicitors in New Zealand wrote to the plaintiff's solicitors admitting receipt of the notice of writ but challenged the service on the ground that New Zealand laws required the notice to be hand delivered — see: exh OTH11 of the plaintiff's affidavit 1.

[36] Counsel did not agree with Tompkins Wake's opinion in exh APM5 of the defendant's affidavit 1 that service of legal proceedings on a company in New Zealand cannot be made by post in reference to s 387 of the New Zealand Companies Act 1993. Counsel posited that Tompkins Wake did not address two issues:

(a) s 388 of the Companies Act 1993:

> 388 *Service of other documents on companies*
>
> (1) A document, other than a document in any legal proceedings, may be served on a company as follows:
>
> (a) by any of the methods set out in paragraph (a) or paragraph (b) or paragraph (c) or paragraph (e) of subsection (1) of section 387; or
>
> (b) *by posting it to the company's registered office or address for service or delivering it to a box at a document exchange which the company is using at the time*; or
>
> (c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company's registered office or address for service or its head office or principal place of business; or
>
> (d) by emailing it to the company at an email address that is used by the company;
>
> (2) Subsection (1) is subject to section 391(3A) to (3C). (Emphasis added.)

(b) counsel argued that the words 'legal proceedings' were not defined in the Act. However, a court have found that the phrase 'legal proceedings' under the Companies Act 1993 does not include foreign legal proceedings. In *Commissioner of Inland Revenue v Compudigm International Ltd (in rec and in liq)* [2011] NZCCLR 6 ('Compudigm International'), the High Court in Wellington in deciding the meaning of 'legal proceedings' under s 248(1)(c)(i) of the Companies Act 1993 found that the phrase does not include foreign legal proceedings:

> [13] *The present case is unusual in that both parties appear to accept that s 248(1)(c)(i) of the Companies Act 1993, the New Zealand provision, does not apply to foreign proceedings*. The section provides that, with effect from the commencement of the liquidation of a company, unless the liquidator agrees or the Court orders otherwise, a person must not commence or continue legal proceedings against the company or in relation to its property. *The commentary in Brookers Insolvency Law & Practice states however that the section 'will not apply to legal proceedings taken in a foreign Court', referring to Re Vocalion (Foreign) Ltd [1932] All ER Rep 519 (Ch). Neither Mr Cardno nor Bally contend that the section must be interpreted as having wider application.*
>
> [14] *In my view, this conclusion is undoubtedly correct. A Court should be slow to infer, in the absence of express words to the contrary, that a legislative provision is of extraterritorial effect*. This was made clear in the recent New Zealand decision in *Poynter v Commerce Commission* [2010] NZSC 38; [2010] 3 NZLR 300 where the Supreme Court held that extraterritorial effect needed to be provided for in express terms, or alternatively had to be signaled by necessary, as opposed to reasonable, implication (see [15], [46] and [78]). (Emphasis added.)

[37] Counsel contended that if a notice of writ issued by a Malaysian court is not a document in 'any legal proceedings' under s 387 of the New Zealand Companies Act 1993, it does not need to be served on the defendants by hand, and can be sent by post in accordance with s 388(1)(b) of the New Zealand Companies Act 1993.

[38] Counsel further submitted that out of abundance of caution, the plaintiff instructed its solicitors in New Zealand, Simpson Grierson to serve the notice of writ on the defendant at Building A, Ground Floor, 52 Highbrook Drive East Tamaki, Auckland, 2013, New Zealand ('old address') in accordance to New Zealand law ('the second service').

[39] Counsel added that Simpson Grierson carried out a new company search on the defendant for its address of service before the second service. Simpson Grierson discovered that the defendant had on 5 August 2020 changed its address for service to 8 Business Parade South, East Tamaki, Auckland, 2013 New Zealand — exh OTH14 of the plaintiff's affidavit 2.

Counsel pointed out that this was not reflected nor addressed in the opinion from Tompkins Wake, which the defendant is relying on.

[40] Counsel elaborated that the sudden change of address for service came as surprise because in the defendant's affidavit 1 dated 1 July 2020 the defendant used the old address and exhibited its own company search dated 30 June 2020 showing the old address, an address which the defendant used since 2014, as its address for service. Further, in the defendant's affidavit 2 affirmed on 12 August 2020 after the change of address, the defendant was still using the old address.

[41] Counsel stated that on 6 August 2020, Simpson Grierson served the notice of writ by hand to the defendant's latest address for service. This was received by the defendant (see: exh APM6 of the defendant's affidavit 2).

[42] Counsel said that this latest service had put the defendant's contention that service was irregular to rest. There is no ground for the defendant to claim that the notice of writ was not regularly served.

[43] Counsel referred to the case of *Westport Malaysia Sdn Bhd v Northern Democrats mbH & Co KG* [2017] MLJU 236 which concerns, inter alia, the defendant's application to set aside the writ, statement of claim and the order granting leave to serve the notice of writ. The defendant claimed that the service of the sealed writ of summons and statement of claim is irregular and invalid as the notice of writ for service out of jurisdiction had not been duly served upon the defendant. Further, the defendant alleged that the order granting leave to serve the notice of writ is irregular for failure to provide a time period within which the defendant has to enter an appearance. Azizah Nawawi J (now JCA) dismissed the application as there was [no] prejudice or substantial miscarriage of justice to the defendant:

> [15] With regards to the defendant's application to set aside the service of the sealed writ of summons and the SOC dated 1 March 2016 on the grounds that the service was irregular, I am of the considered opinion that the plaintiff has regularised the service by re-serving on the defendant the relevant documents pursuant to O 11 r 3 of the Rules of Court 2012 ('the ROC 2012') on 13 June 2016.
>
> [22] Therefore, *I agree with the plaintiff that the omission has not caused any prejudice or substantial miscarriage of justice to the defendant.* All this while, the defendant was made aware of the proposed legal action to be initiated by the plaintiff. It cannot be said that the defendant was ignorant of the fact of the collision and the subsequent legal action as the defendant had actually issued a letter of undertaking, through their P&I, the Swedish Club up to a maximum of USD10,000,000. The defendant could have appointed a local counsel earlier to accept service, instead of making it more difficult to serve the court documents, and thereafter hiding behind a technical objection.

...

[25] In the factual matrix of this case, I am more inclined to follow the decision in *Bank Simpanan Nasional* and case of *Uni Wall Architectural Products & Services Sdn Bhd*. *The non-compliance of O 11 r 4(3) of the ROC has not occasioned a substantial miscarriage of justice*. The defendant owners are the registered owner of the vessel that collided into the plaintiff's property and the owners did not at any time deny the collision. The defendant had even provided the letter of undertaking to the plaintiff, to enable her vessel to continue her journey. The defendant has also ignored the plaintiff's repeated request as to whether the defendant will be appointing local solicitors to accept service of the process. *The writ and the SOC were served on the defendant and the defendant did enter an appearance, albeit a conditional one*. (Emphasis added.)

[44] Counsel concluded that any irregularity in the first service, which is denied, has been cured by the second service. There is no ground for the defendant to seek to set aside the service of the notice of writ.

THE COURT'S FINDINGS ON FIRST ISSUE

[45] I am inclined to agree with the plaintiff's submission that there is no ground for the defendant to seek to set aside the service of the notice of writ for reasons hereafter.

[46] For starters, it is significant to note that the Court of Appeal's decision in *Roger Bogne v Istana Securities Ltd* relied on heavily by the defendant has been set aside by the Federal Court in Federal Court of Malaysia Civil Appeal No 02(i)-7–01 of 2019 (S) on 19 August 2019. The Federal Court reinstated the decision of the learned High Court judge Ravinthran a/l Paramaguru (now JCA). Whilst I am unaware of any judgment written by the Federal Court, a copy of the court order appears as encl 22 in the Federal Court file. The High Court judgment is found at *Istana Securities Ltd v Roger Bogne* [2017] MLJU 2427.

[47] Order 11 r 5 of the ROC 2012 governs the process of service of writs abroad after the court has granted an application for leave to serve the notice of writ out of the jurisdiction pursuant to O 10 r 4. The relevant parts of O 11 r 5 reads:

(1) Subject to the following provisions of this rule, Order 10, rule 1 and Order 62, rule 5 shall apply in relation to the service of a notice of a writ notwithstanding that the notice is to be served out of the jurisdiction.

(2) Nothing in this rule or in any Order or direction of the Court made pursuant to rule 5(1) shall authorize or require the doing of anything in a country in which service is to be effected which *is contrary to the law of that country.*

(3) A notice of a writ which is to be served out of the jurisdiction *need not be served*

personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

...

(5) *An official certificate stating that a notice of a writ as regards which rule 6 has been complied with has been served on a person personally, or in accordance with the law of the country in* which service was effected, on a specified date, being a certificate —

(a) by a consular authority in that country;

(b) by the government or judicial authorities of that country; or

(c) by any other authority designed in respect of that country under the Hague Convention,

shall be evidence of the facts so stated.

(6) An official certificate by the Minister stating that the notice of a writ has been duly served on a specified date in accordance with a request made under rule 7 shall be evidence of that fact.

(7) A document purporting to be such a certificate as is mentioned in paragraph (5) or (6) shall, until the contrary is proved, be deemed to be such a certificate.

(8) ... (Emphasis added.)

[48] As can be seen, O 11 r 5(3) plainly dispenses with the need for personal service so long as the notice of writ is served in accordance with the law of the country in which service is to be effected.

[49] For proof of service, there has to be a 'certificate' or 'a document purporting to be such a certificate' — O 11 r 5(5) and (7).

[50] In this case, the cause papers were served on the defendant by the Malaysian High Commission in Wellington after a long bureaucratic process which transpired after leave was granted by the High Court of Malaya for the notice of writ to be served out of jurisdiction. The modes of service are prescribed by O 11 r 6(3) of the ROC 2012 as follows:

(3) *Where a person intends to serve notice of a writ in any country —*

(a) *through the judicial authorities of that country under paragraph* (1);

(b) *through a Malaysian consular authority under paragraph (1) or (2)*; or

(c) *through the government of that country under paragraph 2*,

(d) *that person shall lodge in the Registry a request in Form 10 for service of notice of the writ by that method, together with a copy of the notice and an additional copy thereof for each person to be served.*

[51] Here, pursuant to O 11 r 6(3), the plaintiff filed on 2 January 2020 its Form 10 at the Kuala Lumpur High Court Registry and requested for

assistance. Pursuant to O 11 r 6(6), the court then sought the assistance of the Ministry of Foreign Affairs (see exh OTH 9) who in turn sent instructions to the Malaysian High Commission in Wellington, New Zealand to perform service on the defendant. The process of service was conducted by the Malaysian Consular Office in Wellington, New Zealand, acting on the instructions of the High Court of Malaya.

[52] The High Court Registry by letter dated 2 July 2020 informed the plaintiff's solicitors that the service on the defendant in Auckland, New Zealand has been successfully completed and enclosed amongst others the letter from the Consular office in Wellington signed by one Tengku Muhammad stating:

> 2. Adalah dimaklumkan bahawa permohonan bantuan penyampaian dokumen Mahkamah kepada defendan Open Country Dairy Limited di New Zealand telah berjaya disempurnakan.
>
> 3. Sehubungan dengan itu, bersama-sama ini dilampirkan salinan pemakluman berserta bukti penyampaian Suruhanjaya di Wellington, New Zealand untuk makluman dan prehatian pihak puan selanjutnya.

[53] The aforesaid letter also enclosed an email and the postal receipt with details of tracking of the Second Secretary Nor Azme Salleh dated 26 June 2020 stating:

> Adalah dimaklumkan dokumen Mahkamah bagi tajuk di atas telah di panjangkan kepada penama melalui perkhidmatan NZ post pada 29 April 2020. Salinan receipt penghantaran dikepilkan bersama.

[54] I do not agree with the defendant's contentions that:

(a) the letter dated 2 July 2020 from the High Court or the letter from the Ministry of Foreign Affairs Malaysia dated 26 June 2020 cannot amount to a certificate as according to him, the letters: (i) did not state that the notice of writ has been served on the defendant personally; (ii) did not state that the notice of writ has been served in accordance with the laws of New Zealand; and (iii) was not signed by the Minister;

(b) that the *Commissioner of Inland Revenue v Compudigm International Ltd (in rec and in liq)* finding on the meaning of 'legal proceedings' is only confined to s 248(1)(c)(i) of the New Zealand Companies Act 1993; and

(c) that the plaintiff has to produce a formal opinion.

[55] Firstly, I subscribe to and agree with Ravinthran a/l Paramaguru J's (now JCA) finding in *Istana Securities Ltd v Roger Bogne* where the High Court held that as the form of an 'official certificate' is not prescribed and the authenticity

of the said documents (including the email) is not challenged, it comes within the meaning of O 11 r 5(7) as long as service was effected in accordance with the law of South Africa. As such the learned judge found the requirements of the law had been fulfilled and the JID was therefore a regular judgment.

[56] In line with the approach takein in *Istana Securities Ltd v Roger Bogne*, with all due respect, I find that the defendant's arguments are not correct as they amount to imposing an unduly stringent standard to have a prescribed mode and form with which a consular authority must comply with before it can be considered a document within the meaning of O 11 r 5(5) and (7). Furthermore, there should be no burden imposed on the applicant to additionally and/or alternatively have a formal opinion or call an expert to confirm that service was effected in accordance with the law of New Zealand.

[57] The Rules itself does not prescribe a certain mandatory form for the consular office's document to be a valid certificate.

[58] In fact, O 11 r 5(7) states:

> (7) *A document purporting to be* such a certificate as is mentioned in paragraph (5) or (6) *shall, until the contrary is proved*, be deemed to be such a certificate. (Emphasis added.)

[59] The words 'document purporting to be' strongly suggests there is no strict requirement as to form:

(a) definition of the word 'document':

(i) Rules of Court 2012:

> 'document' means anything in which information of any description is recorded and includes a claim, summons, application, judgment, order, affidavit, witness statement or any other document used in a Court proceeding.

(ii) s 3 of the Interpretations Act 1948 and 1967:

> 'document' *means any matter expressed or described upon any substance* by means of letters, figures or marks, or by more than one of those means, intended to be used or which may be used for the *purpose of recording that matter*.

(iii) *Oxford Living Dictionary*:

> A piece of written, printed, or *electronic matter* that *provides information* or evidence or that *serves as an official record.*

(b) definition of 'purporting' — *Oxford Living Dictionary*:

> *Appear to be* or do something ...

[60] This means a document that is not the actual document but for all intents and purposes, has the ingredients of the actual document and serves the same function. In other words, it is a confirmation by the Consular office that the document has been served; which is in accordance with the law of the country.

[61] In addition, it must be noted that the mode of service through the consular authorities is a process under O 11 r 6(6) — as indicated under the Senior Assistant Registrar's letter dated 30 January 2020. A reading of O 11 r 6(6) would also show that there is no prescribed form which the Secretary General must abide by when he effects the service. Instead the said rule even allows for 'an alternative manner as is most convenient' to be prescribed by the Registrar and the Secretary General:

> (6) The documents duly lodged under paragraph (3) shall be sent by the Registrar to the Secretary General of the Ministry of Foreign Affairs *with a request that the Secretary General arranges for the writ to be served in the manner referred to in paragraph (3) or, where an alternative manner is indicated, by any of the manner as is most convenient.*

[62] This implies: (a) that the Secretary General can carry out the duties of a Minister (as also under s 6(1) of the Delegation of Powers Act 1956; and s 93(2) of the Interpretation Acts 1948 and 1967); and (b) there is no mandatory form prescribed. Hence information conveyed, including electronically, would suffice. With all due respect, a stringent approach as happened in *Roger Bogne v Istana Securities Ltd* would impose an undue burden on our courts and consular offices for service out of jurisdiction. They would, with respect, have to be educated on the exact format of each foreign country's law.

[63] Secondly, the imposition of a strict form also flies in the face of O 11 r 5(5). Order 11 r 5(5) provides that where a certificate under the following provisions of r 5 is produced in relation to the service of the notice of a writ in accordance with rr 6 or 7, O 10 r 1(4) shall not apply. Order 10 r 1(1) requires endorsements of particulars. This requirement is dispensed with by O 11 r 5(5). Order 11 r 5(5) appeared not to be considered in *Roger Bogne v Istana Securities Ltd*.

[64] A literal interpretation of O 11 r 5(5) read with r 5(7) supports some flexibility in relation to the form of a certificate when these rules are contrasted with the wordings of other rules in the ROC 2012 where a mandatory form and very specific manner in wordings are required — as mere examples, for instance:

(a) an application in Chambers under O 32 r 1:

> Mode of making application (O 32, r 1)

(1) Every application in Chambers shall be made by notice of application in *Form 57*.'

(b) O 14 r 2(1):

2 Manner in which application under rule 1 shall be made.

(1) An application under rule 1 must be supported by an affidavit in *Form 13* verifying facts on which the claim, or the part of a claim, to *which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of damages claimed.*

[65] Contrary to the defendant's counsel's submission, there is no duty on the plaintiff to call expert evidence or produce a formal opinion to confirm that service is effected in accordance with the law of New Zealand as this additional requirement with respect, does not exists in the Rules.

[66] Whilst the proving of foreign law is a question of fact and expert evidence in that respect is relevant (see s 45 of the Evidence Act 1950), the court is certainly not disentitled to interpret such a foreign law when the existence of the same is not in dispute. Malaysian courts have consistently interpreted and distinguished statutes of other jurisdictions without the need of experts.

[67] The High Court in *Atico Overseas Ltd v Procast Furniture Industry Sdn Bhd* [2014] 1 MLJevi 15 (HC) at pp 21–22 in dealing with the issue as to whether the court has jurisdiction to interpret foreign laws, held as follows:

(d) On the issue of proof of foreign law I agree with the submission of the learned counsel for the plaintiff that foreign law can be adduced by directly adducing the foreign law ie the Act or Ordinance as raw evidence. Support for the proposition is found in ss 38, 78(2), 84 and 86 of the Evidence Act 1950 and is elaborated below as follows:

Section 38 of the Evidence Act 1950

When the court has to form an opinion as to a law of any country, any statement of the law contained in a *book purporting to be printed or published under the authority of the Government of that country, and to contain any such law*, and any report of a ruling of the court of that country contained in a book purporting to be a report of such rulings, is relevant.

This section is self explanatory. *Under this section the court may refer to foreign law. However the book or report it refers to must be an authoritative one printed and published by the government* (see *In The Goods of Goh Siew Swee, deceased, Goh Tat Eng v Goh Eng Loon* (1911) 12 SSLR 18). *There seems to be an exception in the case of law reports, which may be published either officially or privately.* (Emphasis added.)

[68] See also the authoritative text in *Sarkar, Law of Evidence* (cited in the High Court case in *Nilai Lanjut Sdn Bhd v Yeng Chong Realty Bhd & Ors* [2018] MLJU 2053 (HC) at para 99:

> In the commentary by the learned authors *Sarkar Law of Evidence* (Vol 1) (18th Ed Lexis Nexis) on s 38, the commentary at p 1131 stated as follows:
>
> > This section is to be read with s 84 in which there is a presumption in favour of the genuineness of the books, which are relevant under this section of the Act. The two sections refer to foreign law and their effect is, that proof of foreign law may be obtained directly from books and without the aid of expert witnesses who according to English practice are required for the purpose. *Even when an expert is examined (under s 45) and produces the authorities on which he bases his opinion, the court is at liberty to examine those authorities and put its own construction on them* ...
> >
> > The difference between the English law and the Act is that under this section books containing statement of foreign laws (published under the authority of Governments of those countries) may be directly referred to by the Court; *but according to English law, the foreign law must be proved by calling experts or professional persons to give their opinions on the subject* (see *Taylot* 10th Ed s 1423 p 973; *Phipson*, 8th Ed, p 382; s 45 post). (Emphasis added.)

[69] As such, it is a question of law — whether or not the legal requirements under New Zealand law had been complied with, irrespective whether or not there is an expert or formal opinion.

[70] If I am wrong in the above conclusions that the service by post on the defendant is in line with New Zealand law and that there is no strict form required for the certificate, I am satisfied that this is a fit case to exercise this court's discretion to cure any defects as the overriding interest of justice must be the focus. Substance must take over form. In this regard, I refer to the Court of Appeal case of *Redang Paradise Vacation Sdn Bhd v Yap Chuan Bin and other appeals* [2017] 5 MLJ 35; [2017] 10 CLJ 296 which elucidated:

> [2] The appeals essentially involved application of common sense principles in decision-making process and construction of Rules of Court ('the RC 2012') to attain substantive justice.
>
> [4] The RC 2012, to ensure the merits of the case or appeal is heard to attain substantive justice, have introduced a number of provisions to fortify the principles. *Cases now have to be heard on merits and cannot be dismissed for non compliance of rules unless there are exceptional reasons to do so.* For example, O 1A of RC 2012 asserts:
>
> > ORDER 1A
> >
> > Regard shall be to justice (O 1A)
> >
> > In administering these Rules, the Court or a Judge shall have regard to the overriding interest ofjustice and not only to the technical noncompliance with these Rules.

And O 2 asserts:

Order 2

Non-compliance with Rules (O 2 r 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or Order therein.

(2) These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.

(3) The Court or Judge may, on the ground that there has been such noncompliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in Order to cure the irregularity. (Emphasis added.)

[71] I have also borne in mind the case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385, where Mohtar Abdullah FCJ stated at p 426 of the judgment:

... Rules are rules! They must be obeyed. Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence of the rules. I agree. *However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the law and the cold letter of the law* ... (Emphasis added.)

[72] In my judgment, the plaintiff who throughout the entire process of service out of the jurisdiction is only permitted/required to liaise with the Registrar of the High Court of Malaya through the filing of Form 10 pursuant to O 11 r 6 of the ROC 2012 has no recourse or authority to communicate with the officials in the Ministry of Foreign Affairs and/or the Consular authorities in Wellington, New Zealand. The plaintiff did all it could, and I do not find there is any fundamental irregularity in the service or certificate that goes to its roots which O 1A and O 2 r 1(3) of the ROC 2012 cannot cure, nor has it caused the defendant a substantial miscarriage of justice when his New Zealand solicitors had in fact admitted receipt of the notice of writ on 5 May 2020. Here, it cannot be disputed that the defendant was fully aware of the notice of writ, even before the second service referred in the following paragraph of this judgment was effected. Indeed, O 1A exhorts the court or judge to have regard to the overriding interest of justice and not only to the technical non-compliance with the rules. I find this matter is eminently

A suitable for the application of O 1A and O 2 r 1(3) as the essence of service is the notification to the defendant of the claim made against it and in this case, it has been achieved.

B **[73]** I find that the defendant's contentions on whether the mode of service by post and the certificate are irregular is water under the bridge as any irregularity in the first service effected by the Consular authorities, if any, has been cured by the second service on the defendant on 6 August 2020 at its latest address for service at 8 Business Parade South, East Tamaki, Auckland, 2013 New Zealand notwithstanding the sudden change of address on 5 August 2020 C by the defendant. I note the defendant had in its affidavits filed in this court, continued to use the old address of 52 Highbrook Drive East Tamaki, Auckland, 2013, New Zealand after 5 August 2020.

D **[74]** In exercising discretion as it is just to do so to cure any irregularity in the circumstances of this case, it seems unlikely to this court that it will cause any affront to the exercise of territorial jurisdiction by the foreign sovereign.

[75] In so exercising discretion, I have borne in mind the underlying purpose E of O 11 of the ROC 2012 which is to ensure that there is evidence that service is successful in bringing notice of the claim to the defendant, and that mode is not contrary to the law of the foreign jurisdiction. In this regard, I agree whole heartedly with the approach of Azizah Nawawi J (now JCA) in *Westport Malaysia Sdn Bhd v Northern Democrats mbH & Co KG* [2017] MLJU 236 F where as here in this case, the defendant was served again the relevant documents and there was no prejudice or substantial miscarriage of justice to the defendant. If there was prejudice, the defendant has not shown any. The range of examples below discussed in this judgment fortifies my decision.

G **[76]** In Singapore, the approach taken in interpreting O 11 of the Singapore Rules of Court which is *pari materia* with our O 11 of the ROC 2012 is instructive. The Singapore High Court decision of *BNP Paribas (FKA Banque National De Paris) v Polynesia Timber Services Pte Ltd & Anor* [2002] 4 SLR 933 held that as the underlying purpose of service was served in bringing notice of H the claim to the defendant, any lack of precision in the process of service ought not to invalidate the proceedings. The plaintiff in that case commenced proceedings in the Singapore Courts against the defendants who were resident in Malaysia and obtained judgment in default against the same. The High Court found that the non-compliance with the Practice Direction in Malaysia I was not fatal and it would be unreasonable to penalise a plaintiff *when it was clear that the defendant had knowledge of the service*:

> [38] Here, *it cannot be disputed that the second defendant was fully aware*, even before substituted service was effected, that a writ had been issued against him by the plaintiffs, because of his letter dated 17 July 2000 (see 39 below).

Consequently, there is no question of his having suffered prejudice as a result of not knowing of the advertisements. In this regard, I quote the following extract from the judgment in *Karen Ahmad v Standard Chartered Bank* (35 supra):

> [(2)] *the intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings. If this purpose is achieved, the question as to whether the application for substituted service was in Order or otherwise is no longer relevant.*

[77] The Singapore High Court also highlighted the practical problems faced by plaintiffs — through no fault of theirs — and how these factors must be taken into account in determining whether or not service was valid. For instance, where Singapore plaintiffs had no control of how the service was being effected by the Malaysian judicial authorities, it would be unduly harsh to penalise the plaintiffs and/or their solicitors for the acts/omissions of the process server:

> [24] Hii pointed out that service was not effected by the plaintiffs but through the Malaysian judicial authorities. *Consequently, the process of service was beyond the control of the plaintiffs and the charge of non-compliance by the plaintiffs with the Practice Direction was misconceived. The attempts at service by the court process server were an official action of the Malaysian judicial authorities outside the control of the plaintiffs; any omission should not be a ground to challenge the validity of the proceedings.* In any case, according to the holdings in *Karen Ahmad Aliyuddin v Standard Chartered Bank* 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) [5328], *Malayan United Finance v Sun Chong Construction* [1995] 4 MLJ 741, and *Re Yeap Chee Fun, ex p Pernas Trading* [2000] 5 MLJ 510, courts had specifically stated that non-compliance with para 5 of the Practice Direction was at most an irregularity which did not nullify proceedings.
>
> [37] ... I should add that in our case, *where Singapore plaintiffs are dependent on service being effected by the Malaysian judicial authorities, it would be unduly harsh to penalise the plaintiffs and/or their solicitors for the acts/omissions of the process server.* The plaintiffs/their solicitors were in no position to dictate how or where service on the second defendant should be effected, once the process of service had begun.

[78] The plaintiff's counsel drew attention of this court to *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2015] 4 SLR 625; [2015] SGHC 144 which usefully set out a category of cases where any irregularity in service can be cured if such service is successful in bringing notice of the claim to the defendant and is not contrary to the law of the foreign jurisdiction:

> [76] In *ITC 2011* ([4] supra), Lee J held, at [38], that:
>
> *Ong & Co* is no longer authoritative ... not all errors arising in the process of service out of jurisdiction would render the purported service a nullity. Rather they would constitute a mere irregularity and the Singapore courts do have jurisdiction to cure such irregularities under O 2 r 1(2) of (the 2006 Rules).

A While I agree that 'not all errors' of overseas service are incapable of cure, the question remains: what sorts of irregularities should be cured and what should not? Having reviewed the authorities, I have observed that cases involving irregularities in the service of process out of jurisdiction may be divided into three broad categories.

B

(a) Cases where service was held to be invalid because the attempted service was unsuccessful in bringing notice of the claim to the defendant ('Category A').

(b) Cases where service was held to be invalid because the method of service employed — though successful in bringing notice of the claim to the C defendant — was contrary to the law of the foreign jurisdiction ('Category B').

(c) Cases where service was invalid because the method of service employed - though successful in bringing notice of the claim to the defendant and not D contrary to the law of the foreign jurisdiction — had nevertheless failed to comply with a procedural requirement provided for in our Rules ('Category C').

[77] In my view, cases falling within Categories A and B are not curable whereas cases falling within Category C are curable if it would be just for the court to do so.

E

[79] The Singapore High Court in *Humpuss* pinpointed 'Category C' cases as a curable category of cases where there are certain apparent irregularities in the process of service under the relevant rules of court but such service is still F deemed as valid as despite the breach of procedural rules, the service: (i) is not contrary to the law of the foreign jurisdiction; and (ii) is successful in bringing notice of the claim to the defendant. The court also recognised that practical problems occur in service of writs out of the jurisdiction and more often than not, it is not the fault or beyond the control of the plaintiff:

G [93] In *Phillips* ([89] supra), the defect consisted of a failure to serve the original copy of the writ. However, this was not the plaintiff's fault. The foreign process section of the High Court of England had erroneously stamped the original English claim form with the words 'Not for service out of jurisdiction' and it was this error which led the Swiss courts to remove the claim form from the package of documents H which was handed over to the defendant. However, the defendant knew *exactly* what the claim was about. She had been served with a translated copy of the claim form (and the particulars of claim — ie, the statement of claim, which contained more details than the claim form itself) in German. It was notable that the defendant had, immediately upon receipt of the documents, commenced parallel proceedings in I Zurich in the hope that she could steal a march on the plaintiff by obtaining a stay of the English proceedings under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, 1659 UNTS 13. In the circumstances, I would have found this case — as Lord Brown of Eaton-Under-Heywood did — to be a compelling call on the exercise of the court's discretion.

[80] In the United Kingdom, in *Olafsson v Gissurarson (No 2)* [2008] 1 WLR 2016, the claimant, issued proceedings in England against the defendant, who was domiciled in Iceland. The claimant's solicitor made a request to the High Court for the claim form to be served on the defendant through the Foreign and Commonwealth Office ('FCO') pursuant to the Lugano Convention. The FCO sent the relevant documents for service with a letter to a consular office in Reykjavik. The consul officer duly served the claim form on the defendant but the defendant had not signed a declaration confirming receipt of the documents as was required under Icelandic laws. As the defendant had not entered appearance, judgment in default was entered. The defendant applied to set aside the JID on the basis of error in service. Both the English High Court and the Court of Appeal rejected the defendant's application, cured the irregularity and dispensed service pursuant to r 3.10 (O 2 r 1(3) of our rules) and r 6.9 (O 62 r 14 of our rules) on the basis, inter alia, that the claim was in fact brought to the defendant's notice and it would be affront to the overriding objective of the CPR to prevent injustice:

> ... In my judgment, on the particular facts of this case, where the claim form was issued in time and delivered to the defendant within the period for service by a method of service which the claimant and his solicitors could reasonably have thought was a reasonable method of service, and where the defendant knew precisely what claim was from the claim form, it would be unjust and contrary to the principle of the overriding objective that cases should be determined justly to refuse the relief. That is in my opinion so even though there was some delay before the claimant relied upon CPR r 6.9 ...
>
> ... 55 In these circumstances I see no reason in principle why English procedural law (or indeed the law of another contracting state if the facts were reversed) should not have a discretionary power to dispense with service in an appropriate case, *especially since the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case*: see eg *Barclays Banks of Swaziland Ltd v Hahn* [1989] 1 WLR 506, 59 per Lord Brightman, and the definition of 'service' in the glossary to the CPR, which describes it as 'steps required to bring documents used in court proceedings to a person's attention': see Civil Procedure 2008, Vol 1, p 2394. Thus, as in *Anderton's case* [2002] 1 WLR 3174 and as here, there may be cases in which formal service is not necessary to achieve that aim.

[81] In the House of Lords decision in *Phillips and another v Symes and others (No 3)* [2008] 1 WLR 180 (a decision referred to in the Singapore *Humpuss* case), Lord Brown held that notwithstanding the fact that the claim form served on the defendant clearly bore the erroneous stamp of the High Court being 'not for service out of jurisdiction', *the service was valid as the defendant suffered no prejudice and notice of the claim was brought to the defendant's attention*. The mistake was of the authorities effecting the service and not the claimant and this all the more encourages the exercise of the discretion to cure the irregularity and to dispense with service:

> 38 In my judgment the circumstances here were indeed exceptional, the call on the

exercise of the court's discretion compelling. *As stated, the second and third defendants plainly suffered no prejudice whatever by the failure to serve the original claim form but rather sought to exploit it, to steal a march on the claimants. And the essential faults here were those of the Swiss authorities*: of the judge or his clerk at the Zurzach court (however well-intentioned) in mistakenly removing the form from the package of documents for service and the Swiss Post Office in failing to find Nefer's post-box (in each case substantially delaying notification of the problem to the claimants).

[82] In *Abela and others v Baadarani* [2013] 4 All ER 119 (UKSC) (a decision also referred to in the Singapore *Humpuss* case), the UK Supreme Court in a unanimous decision recognised that under r 6.15 of the CPR, courts have the power authorise service by an alternative method or at alternative place if there is 'good reason to do so'. In that case claimants' solicitors attempted to serve the claim form and other documents on the defendant in Lebanon through diplomatic channels but such efforts were close to futile. The claimant through their solicitors then served the claim on the defendant's English solicitors — even through the solicitors made it clear that he had no obligation to accept service. *The UK Supreme Court in overturning the decision of the Court of Appeal declared the alternative means of service as good service. The UK Supreme Court held that since the defendant through his advisers had been fully aware of the proceedings which were sought to be brought against him, there is no reason to accept the defendant's objection.* Moreover, the defendant had displayed contumelious conduct in refusing to co-operate with the process of service by disclosing his address in Lebanon. It is therefore proper to declare the service as good as long as the purpose is fulfilled *and there is no suggestion that such service was contrary to Lebanese law (even though it was not one of the permitted ways of service under Lebanese law)*:

> *... although it was held that delivery of the claim form was not permitted se rvice under Lebanese law, it was not suggested or held that delivery of the documents was contrary to Lebanese law or that an Order of an English court that such delivery was good service under English law was itself contrary to Lebanese law ...*
>
> ... 37 Service has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to the defendant. In *Olafsson v Gissurarson (No 2)* [2008] 1 WLR 2016, para 55 I said, in a not dissimilar context, that:
>
> > *the whole purpose of service is to inform th defendant of the contents of the claim form and then ature of the claim an t's case : see eg Barclays Bank of Swaziland Ltd v Hahn* [1989] 1 WLR 506*, 509, per Lord Brightman, and th e def inition of 'service' in the glossary to the CPR, which describes it as 'steps required to bring documents used in court proceedings to a person's attention ...*
>
> I adhere to that view.
>
> 38 It is plain from his judgment [2011] EWHC 116 at [73] quoted above that the judge took account of a series of factors. He said that, most importantly, it was clear

that the respondent, through his advisers was fully apprised of the nature of the claim being brought. That was because, as the judge had made clear at para 60, the respondent must have fully aware of the contents of the claim form as a result of it and the other documents having been delivered to his lawyers on 22 October in Beirut and communicated to his London solicitors and to him. As Lewison J said at para 4 of his judgment (quoted above, para 25):

> *The purpose of se vice of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations.*

I agree ...

> ... 45 I do not agree that for the court to make an Order under rule 6.15(2) is 'to make what is already an exorbitant power still more exorbitant'. I recognise of course that service out of the jurisdiction has traditionally been regarded as the exercise of an exorbitant jurisdiction. That is a consideration which has been of importance in determining whether permission to serve out of the jurisdiction should be granted, although in this regard I agree with the approach set out by Lord Sumption JSC in his judgment. In any event, in this case, it is now accepted that it was proper to serve the claim form out of the jurisdiction. The rules as to the method of service set out above seem to me to have the legitimate sensibilities of other states in mind. *It is for that reason that CPR r 6.40(4) provides that nothing in CPR r 6.40(3) or in any court Order authorises or requires any person to do anything which is contrary to the law of the country of service. I have already expressed my view that the Order recognizing the delivery of the claim form as alternative service under English law is not contrary to Lebanese law. Moreover it was not in breach of any convention or treaty but merely recognized that the claim form (and other documents) had been brought to the attention of the respondent*. I do not think, therefore, that in a case not involving the Hague Service Convention or a bilateral service treaty, an Order under rule 6.15(2) must be regarded as 'exceptional' or, indeed as suggested in para 29 of Longmore LJ's judgment, that there must be a 'very good reason' for it. As already stated, the CPR do not so provide. They merely require good reason.

[83] The UK Supreme Court has clearly drawn the difference between what is 'not permitted under the law of the country of service' and 'contrary to the law of the country of service'. That is to say, whilst service may not be in a permitted form under the foreign law, it is still acceptable as good service as long as the said service does not contravene the foreign law and is successful in bringing notice of the claim to the defendant's attention.

[84] Before I conclude on this issue, I am unaware of any Federal Court decision in Malaysia providing guidelines as to what is required of a party to challenge the validity of service under O 11 and what would amount to good service curable under O 1A and O 2 rr 1 and 3 of the Rules of Court 2012. It

seems to me that judgments of our courts (save for the Court of Appeal in *Roger Bogne v Istana Securities Ltd*) seemingly trend towards the flexible approach as adopted by the courts in Singapore and the UK. For instance, the Court of Appeal in *Ma Boon Lan v UOB Kay Hian Pte Ltd (previously known as Kay Hian Pte Ltd) and another appeal* [2013] 4 MLJ 848 rejected the defendant's argument that the plaintiff's service of writ was irregular as it was not served through the magistrate or registrar in Singapore in accordance with O 11 r 5(5). The court held that O 11 r 5(5) is an enabling provision which permits the service of writ through the Singapore judicial authorities *but it is by no means mandatory*. Notice of writ can always be served out of jurisdiction as long as it is in accordance with the law of the country. Azahar Mohamed JCA (now CJ (Malaya)) held:

> [12] This then brings into focus the following question: whether the plaintiff had complied with the RHC in effecting service out of jurisdiction on the defendant. In the first place, it is not disputed that the plaintiff had obtained the necessary leave from the court on 17 June 2010 for the issuance of a writ notice to be served out of the jurisdiction on the defendant pursuant to O 6 r 6(1) of the RHC. Next, on 27 August 2010 the plaintiff obtained leave from the court an Order for service out of jurisdiction pursuant to O 11 r 4. *Now, the provision relating to the service of a notice of writ outside jurisdiction is O 11 r 5(3) of the RHC which provides that a notice of writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.*
>
> The other relevant provision is O 11 r 6(2) of the RHC 1980 which reads:
>
> > Where in accordance with these rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the notice may be served:
> >
> > (a) through the judicial authorities of that country; or
> >
> > (b) except where service through a consular authority or by the plaintiff or his agent is prohibited by the law of the country:
> >
> > (i) through a Malaysian Consular authority in that country; or
> >
> > (ii) by the plaintiff or his agent.

[85] In *Ma Boon Lan*, the Court of Appeal also held that service was good as it was not disputed that the defendant never denied that the writ of summons with the statement of claim had been duly served on them.

Whether the Malaysian courts should not assume jurisdiction over this dispute as there is allegedly an express choice of jurisdiction clause in the relevant contract(s)

[86] The defendant contended that this court should not assume jurisdiction over this dispute because:

(a) the plaintiff has agreed to submit to the exclusive jurisdiction of the courts New Zealand:

(i) by virtue of cll 19.1 and 19.2 of 'Open Country's Terms of Trade' reproduced below:

> 19. General
>
> 19.1 New Zealand law governs all transaction between the Customer and the Company
>
> 19.2 If the Customer is domiciled in country that has a reciprocal enforcement of foreign judgment regime with New Zealand, then the Customer *submits to the exclusive jurisdiction of the New Zealand Courts.* If the Customer is domiciled in a country that does not have reciprocal enforcement of foreign judgment regime with New Zealand, the Customer submits to the exclusive jurisdiction of the Singapore International Arbitration Centre (SIAC). The seat of arbitration will be in Singapore. The arbitration will be conducted in English, in accordance with the Arbitration Rules of SIAC for the time being in force, and the Tribunal will consist of three arbitrators;

(ii) there is reciprocal enforcement of judgments between Malaysia and New Zealand;

(iii) counsel pointed out that in *World Triathlon Corp v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394; [2019] 1 CLJ 381 the Court of Appeal held:

> [19] In the present appeal, just like the *American Express* case, the *parties here had agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/USA*. Now, the law in relation to the exclusive jurisdiction or forum selection clause is not controversial. *Although generally a forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed (see Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154; [1976] 1 LNS 31). *Disregarding such a clause would effectively mean the courts condoning a breach of the agreement.*

(iv) counsel said that the Court of Appeal in *World Triathlon Corp*, further held that the Malaysian courts will give effect to an agreed jurisdiction clause unless 'the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal':

> [20] On the question of how such discretion is to be exercised when confronted with a foreign jurisdiction clause, the then Federal Court in *Globus Shipping* accepted the approach as summarised by Brandon J in the *Elefitheria* [1969] 2 All ER 641 as follows:
>
> The principles established by the authorities can, I think, be summarised as follows: (I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English

court, assuming the claim to be otherwise within its jurisdiction, *is not bound to grant a stay but has a discretion whether to do so or not*. (II) *the discretion should be exercised by granting a stay unless strong cause for not doing so is shown*. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, *the court should take into account all the circumstances of the particular case*. (V) In particular, but without prejudice to (IV), the following matters, *where they arise, may properly be regarded*: *(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial*.

[21] So; to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, *unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction.*

(v) the defendant submitted that the plaintiff is bound by *Open Country's Terms of Trade* which were already incorporated through the reference in each sales contract which was signed by the plaintiff (see exh APM4), the filing of this suit within the jurisdiction of this honourable court is a breach of the express agreement made between the parties and courts should obliged to give effect to it as that is what has already been agreed by the parties — *World Triathlon Corp*;

(vi) counsel drew attention to *Ajwa For Food Industries Co (Migop), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395 where the Court of Appeal held that:

[17] *The legal position is very clear: that parties are bound by the terms of the contract with they had executed and this includes reference to another incorporated document where those terms can be found whether they take the trouble of reading them or not. There is imputed knowledge that the terms of the document incorporated are binding as if it was written into the contract itself.*

[18] The Indian court in the case of *TN Roa v Balabhadra* AIR 1954 Mad 71, supports the above proposition. Venkatarama Aiyar J in that case ruled as follows:

When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This

principle has been extended to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into the document and ascertain the terms. An examination of the authorities in which this view has been adopted shows that they are either cases in which the other contract is one between the same parties and therefore the terms including the arbitration clause might be taken to have been within the knowledge of the parties; or cases in which there is a reference to a specific document which was in existence and whose terms could easily be ascertained if the parties wanted to. It is reasonable to hold that when the parties had referred to a document which was in existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document and an arbitration clause contained in that document must, therefore, be held to be binding on them exactly as if it had been incorporated in extenso in the signed contract. The foundation of this reasoning is the existence of another specific document containing an arbitration clause. It is essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreements. Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the agreement actually signed by the parties there must at least be a specific contract or document containing such a clause in respect of which it might be said that it has been incorporated in the agreement of the parties by reference.

[19] In the present case, the respondent's standard terms and conditions were circulated to all buyers and additional copies were made available at all their branch offices. The appellant having bought from the respondent over a lengthy period of time had full knowledge and had done business throughout on the basis of the said respondent's standard terms and conditions. *Therefore the sales contracts constitute the concluded contracts between the parties, the said standard terms and conditions clearly referred to and incorporated there, would be effective and binding upon the appellant regardless of its denials of having seen them.*

(vii) the defendant contended that Open Country's terms of trade was incorporated by reference in each sales contract signed by the plaintiff. The link to Open Country's terms of trade was made available to the plaintiff at all material times and the contents were merely a click away;

(viii) the plaintiff's contention that *Open Country's terms of trade* was never furnished to them is misconceived;

(ix) the courts of New Zealand is the most appropriate forum to hear this dispute:

(A) the plaintiff had expressly agreed to submit the exclusive jurisdiction of the Courts of New Zealand;

(B) the majority of the defendant's witnesses to answer to the various allegations made by the plaintiff are located in New Zealand; and

(C) as admitted by the plaintiff in para 11 of the plaintiff's affidavit in reply, IWMP is only received at Port Klang, Malaysia. The manufacture and/or production of the IWMP itself is in New Zealand. The witnesses best qualified to testify with respect to the process of manufacturing or producing the IWMP are located in New Zealand, citing *World Triathlon Corp* where Harminder Singh Dhaliwal JCA (as he then was) held:

> [22] Now, although the learned judge had appreciated the correct principles when he held that 'the burden is on the plaintiff to show a strong case to override the agreement in the forum selection clause', the learned judge, however, had erred in his finding that the respondent had discharged this burden. In the judgment, the learned judge found:
>
> > [13] Here, I find that witnesses to the triathlon events organised by plaintiff, financing of the events including online payments of participants fees, the fraud and conspiracy by one of the plaintiff's director are all in Malaysia. This includes Dato' Sri Ram who liaised with defendant vide email to explain the defaults complained by the defendant. Certainly, the plaintiff will have a bear substantial expense and inconvenience to bring all these witnesses to Florida, United States.
> >
> > [14] The plaintiff also is a Malaysian incorporated company and has its place of business in Malaysia. Evidence including documents relating to the Event License Agreement and matters related to the triathlon event has to be given by the plaintiff's representatives who reside in Malaysia.
> >
> > [15] Therefore the evidence on issues of fact is situated or more readily available in Malaysia.
> >
> > [16] In the circumstances, I find that the plaintiff has shown a strong case to override the forum selection clause and to have the suit to be tried in Malaysia.
>
> [23] *In our view, these considerations accepted by the learned judge are insufficient to override the exclusive jurisdiction clause. More is required as the parties had willingly and contractually agreed to the exclusive jurisdiction clause as well as the laws of Florida/USA as the law of choice for the litigation. The respondent must show than just inconvenience to witnesses and cost of litigation. Practical inconvenience is not a determinative factor. What matters most is the suitability of the forum which will meet the ends of justice.*

[87] The plaintiff on the other hand contended that:

(a) *Open Country's terms of trade* purportedly containing the jurisdiction clause was never furnished to the plaintiff and as such, are not applicable:

(i) firstly, the 'Open Country terms of trade' was referred to in an internet link in the 'sales contracts' issued by the defendants had a statement in bold below the link which stated:

> Please be advised that OCD has *modified* its Terms of Trade please consult the *attached terms*.
>
> There was nothing attached to the 'sales contracts'. There were no 'attached terms'. The modifications were supposed to be attached to the 'sales contract' but were not. Clearly, there was no consensus between the parties to incorporate any jurisdiction clause as part of the seven contracts as the plaintiff had no knowledge;

(ii) secondly, it is settled law that it is not possible, to incorporate as part of a contract, documents which are not furnished by one party to the other party prior to the contract — citing *Rockwell Automation (M) Sdn Bhd v Samtech Solutions Sdn Bhd* [2018] MLJU 895 where the court rejected the plaintiff's attempt to incorporate specifications which are not furnished to the defendant. Darryl Goon JC (now JCA) held that:

> [52] As was, with respect, quite sensibly pointed out in *Shia Kian Eng (trading as Forest Contractors) v Nakano Singapore (Pte) Ltd* [2001] SGHC 68 *by Judith Prakash J (as she then was):*
>
> > *It is difficult to incorporate as part of a contract documents which are not furnished (and not simply shown) by one party to the other either prior to or at the time signing of the contract unless there is clear indication by that other party that he would accept documents subsequently given as part of the contract. This did not happen in this case.*
>
> ...
>
> [54] Therefore, *the only conclusion that this court may come to on this issue is that the Metix specifications were never incorporated as part of the purchase orders*. (Emphasis added.)

(iii) thirdly, it is settled law that the court imposes a higher threshold for the incorporation of choice of law and jurisdiction clauses. Clear and precise words which reflect the consensus between the parties are necessary for their incorporation. In the present case, there were none:

(A) in *AIG Europe (UK) Ltd and others v The Ethniki* [2000] 2 All ER 566, the English Court of Appeal held:

> 39. ... In my judgment, this is a good and sufficient reason for asking, in both contexts, what is essentially the some question: *did the parties to the contract in which the general words of incorporation appear intend that their contract should include the particular term from the other contract referred to?*
>
> 40. In my judgment, *the judge was correct to answer this question in the negative as regards the jurisdiction clause in the present case.* In the original insurance, the

clause does nothing to define the risk, and if regard is had to its terms, they are wholly inappropriate to disputes arising between insurers and reinsurers under the reinsurance contract (as distinct from disputes under the original insurance, which could be binding on reinsurers notwithstanding that they were decided by the Greek courts).

41. Like the judge, I have considered this issue on the basis that the construction of the reinsurance contract is governed by its proper law, English law. It would perhaps be more correct to interpret and apply art 17 in accordance with Community law, as was done by this court in Credit Suisse *Financial Products v Société Generale d'Enterprises* [1997] CLC 168 at 170 (where the parties agreed on this approach) and as was held by *Tuckey J in ARIG Insurance Co v SASA Ass Riass Spa* (10 February 1998, unreported). But the result, in my judgment, is the same. *The governing European authority is Estasis Salotti di Colzani Aimoe Gianmario Colzani v RUWA Polstrereimaschinen GmbH Case 24/76* [1976] ECR 1831) *which requires 'clear and precise demonstration' in the reinsurance contract that the jurisdiction clause relied on was in fact the subject of consensus between the parties. That test is not satisfied here*. (Emphasis added.)

(B) in *Africa Express Line Ltd v Socofi SA and another* [2010] 2 All ER (Comm) 1085, the English High Court held that:

[30] *Where the terms of a wholly separate contract are incorporated, different consideration apply. A bill of lading which incorporates all the conditions of a specified charterparty will not usually incorporate a charterparty arbitration clause, in the absence of express wording to that effect. By analogy with the incorporation of arbitration clauses into bills of lading from charterparties, the law adopts 'a fairly strict approach' (see Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2005] EWHC 1887 (Comm) at [48]; [2006] Lloyd's Rep IR 127 at [48] per Aikens J, affirmed [2006] EWCA Civ 389, [2006] 2 All ER (Comm) 385) to the incorporation of jurisdiction clauses from an insurance (or reinsurance) contract into another reinsurance contract. Only those terms directly germane to the parties' agreement are carried over. The presumption is that these usually exclude a jurisdiction clauses. In that case a provision in the excess reinsurance slip that it was '[t]o follow all terms and conditions of the primary policy together with riders and amendments thereto covering the identical subject matter and risk' was held to be inapt in incorporate a Mauritian jurisdiction clause in the primary reinsurance.

[31] It is, however, necessary, always to remember that the ultimate issue is what objectively did the parties intend: see the Dornoch case at first instance ([2006] Lloyd's Rep IR 127 at [48]). In the Court of Appeal in that case Tuckey LJ said ([2006] 2 All ER (Comm) 385 at [27]):

There are many cases in which the court have to decide whether terms from one contract have been incorporated in another. A number of these cases concern the incorporation of terms from a direct insurance into a reinsurance. But no hard and fast rules emerge from these cases as one would expect. The question in each case is one of construction: did the parties to the

> contract in which the general words of incorporation appear intend that their contract should include the particular term from the other contract referred to? It may be, as Mr Kealey submits, that the courts will answer this question in favour of incorporation more readily in some categories of cases than in others, but that is no more than saving that the contractual context and the words used are all important. *As choice of law and jurisdiction clauses are important, clear words of incorporation are required*. In the insurance context where the contracts concerned are back-to-back and cover the same subject matter and interest incorporation is more likely to have been intended than where the contracts are not so closely connected. (Emphasis added.)
>
> Finally, the plaintiff's counsel argued that in any event, 'terms of trade' referred to in the 'sales contract' does not by its natural meaning include a jurisdiction clause and/or a choice of law clause. In the absence of clear and unequivocal language, the purported jurisdiction clause and/or choice of law clause in the alleged 'Open Country terms of trade' cannot be incorporated into the seven contracts.

(c) counsel argued that the Malaysian courts have jurisdiction under O 11 r 1 of the ROC 2012 to try any action which falls under any of the 13 limbs therein. If an action falls under one of the limbs, the court may grant leave to serve a notice of writ out of jurisdiction. Counsel said the present action falls under O 11 r 1(F) and/or (G):

(i) the action is brought to enforce a contract or to recover damages in respect of *the breach of a contract which was made within the jurisdiction*; or

(ii) the action is brought in respect of *a breach committed within the jurisdiction* which rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(iii) counsel submitted that O 11 of the ROC 2012 is not merely procedural. It confers extra territorial jurisdiction on the courts, citing the Federal Court case of *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor* [2014] 6 MLJ 189 which held:

> From the above quoted passage, it is clear that the then Supreme Court acknowledged the fact that O 11 of the RHC does confer jurisdiction. His Lordship Gopal Sri Ram JCA (as he then was) in the case of *MatchPlan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424; [2004] 1 CLJ 810 in referring to the then Supreme Court case of then Malayan Banking Bhd took pains to set out how O 11 of the RHC and s 23 of the CJA are to be construed. His Lordship has this to say:
>
> Once the court is seized of extra-territorial jurisdiction by virtue of s 23(1) of the CJA, O 11 r 1 ceases to be of jurisdictional relevance. The decision in *Malayan Banking Berhad v International Tin*. Council make it plain that O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of

s 23(1). Accordingly, in cases where s 23(1) applies, O 11 r 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad. In the present case, if the plaintiffs are right in their argument on the facts, then *this is a case that falls both under s 23(1)(a) and (c) of the Courts of Judicature Act as well as under para (h) of O 11 r 1 which empowers the court to grant leave to a plaintiff to serve a writ out of jurisdiction 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. So it does not really matter which of these provisions is relied upon to found jurisdiction in this case.*

[13] We see no necessity to regurgitate what had been so admirably explained by His Lordship Gopal Sri Ram in the case of *MatchPlan Malaysia*. As such premised on the decision of Malayan Banking Berhad and *MatchPlan Malaysia* we are of the considered view that O 11 of the RHC does not only confers jurisdiction but that it stands independently on its own and is not predicated upon, s 23 of the CJA 1964. (Emphasis added.)

(iv) counsel stressed that in determining whether the High Court of Malaya has jurisdiction over a defendant, the allegations of the plaintiff in the statement of claim must be assumed to be true. There should not be a trial on the affidavits:

(A) in *Matchplan (M) Sdn Bhd & Anor V William D Sinrich & Anor* [2004] 2 MLJ 424 ; [2004] 1 CLJ 810, the Court of Appeal held, in respect of an application to discharge an order granting leave for service out of jurisdiction:

[17] So too here. *The merits of the plaintiff's claim that there was publication are yet to be tried*. The mere *ipse dixit* of the defendant that there was no publication cannot be determinative of the matter. At the risk of repetition, it needs to be said that at the point of determining whether the tort of defamation was committed within the jurisdiction, all *the allegations in the statement of claim must be presumed to be true. At that stage there is no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction. Were it otherwise, there is a risk that applications to discharge an Order granting leave under O 11 r 1 may turn out to be mini trials without determining the suit on its merits*. (Emphasis added.)

(B) counsel submitted that the decision in *Matchplan* was affirmed by the Federal Court in *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] Supp MLJ 151:

[42] From the authorities, *it is clear that there should not be a trial on the affidavits in determining whether the plaintiff has established a good arguable case*. As stated by Gopal Sri Ram JCA in *Matchplan (M) Sdn Bhd & Anor for the purpose of determining whether High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations of the plaintiffs in the statement of claim must be assumed to be true. The application for leave under O 11 r 4 of the RHC should not be turned into a mini trial. Hence, the primary consideration at the leave stage is whether or not the court should grant leave to issue the writ out*

of jurisdiction, not so much on the merits of the case. (Emphasis added.)

(C) in *Rintis Malay Motors Sdn Bhd v Agasta Co Ltd* [2017] MLJU 874, the plaintiff sued the defendant for, inter alia, a declaration that the sales contracts between the parties are *void ab initio*. The High Court followed the decision in *Matchplan* and held that based on the statement of claim, the cause of action arose in Malaysia:

[15] *In determining whether s 23(1) of the CJA applies to a case, the Federal Court in Goodness for Import And Export approved the decision of the Court of Appeal in Matchplan and held that in determining the question whether the High Court has jurisdiction under s 23(1) of the CJA, the allegations of the plaintiff in a statement of claim must be assumed to be true. Gopal Sri Ram JCA in Matchplan explained why it is so*:

It is elementary law that for the purpose of determining whether the High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations made by the plaintiffs in their statement of claim must be assumed to be true. Thus, in Vanity Fair Mills Inc v T Eaton Co Ltd [1956] 25 CPR 6 Waterman J observed as follows:

> *Although the parties presented many affidavits, depositions, and exhibits for the consideration of the district court, there has been no trial of facts, and the complaint is unanswered*. On an appeal from a judgment granting a motion to dismiss a complaint for lack of federal jurisdiction, we must assume the truth of the facts stated in the complaint.

See also Rediffasion (Hong Kong) Ltd v AC of Hong Kong [1970] AC 1136 per Lord Diplock.

So too here. The merits of the plaintiffs' claim that there was publication are yet to be tried. The mere ipse dixit of the defendant that there was no publication cannot be determinative of the matter. *At the risk of repetition, it needs to be said that at the point of determining whether the tort of defamation was committed within the jurisdiction, all the allegations in the statement of claim must be presumed to be true. At that stage there is no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction*. Were it otherwise, there is a risk that applications to discharge an Order granting leave under O 11 r 1 may turn out to be mini trials without determining the suit on its merits. (Emphasis added.)

[16] *The Federal Court in Goodness For Import And Export approved the Court of Appeal's ratio decidendi in Matchplan that under s 23(1) of the CJA, there is no burden on the plaintiff to prove to a conviction that the facts on which their action is based exist within the jurisdiction of the High Court.*

[18] On the assumption that the allegations in the plaintiff's statement of claim are true, the causes of action and the alleged facts of duress and/or coercion and the defendant's conduct in lodging the complaints to PERKEMA all arose in Malaysia.

A [19] Based on the reasons discussed above, I find that prime facie the facts of the present case comes within the ambit of s 23(1)(a) and (c) of the CJA. Accordingly, I find that the High Court of Malaya has jurisdiction to try the proceedings in this case. (Emphasis added.)

B THE COURT'S FINDINGS ON THE SECOND ISSUE

[88] The plaintiff pleaded in the statement of claim that the contracts were made within the jurisdiction and the breach occurred in Malaysia and therefore the Malaysian courts have jurisdiction.

C

[89] Following the elucidations in *Matchplan*'s case, the plaintiff's pleaded case must be assumed to be true at this stage. As such I find that the High Court of Malaya is seized of extra-territorial jurisdiction by virtue of s 23(1)(a) and (c) of the Courts of Judicature Act 1964 as well as sub-rule (F) and/or sub-rule (G) of the O 11 as the action is:

D

(a) brought against the defendant to enforce the seven contracts which were made within the jurisdiction; and

E (b) brought in respect of a breach committed within the jurisdiction which rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction.

[90] The defendant however argues there is a foreign jurisdiction clause where parties have agreed to submit to the jurisdiction of the courts of New Zealand and for New Zealand law to apply in a document known as 'Open Country terms of trade' which the defendant contended formed part of the contract between the parties.

F

G **[91]** However, the Federal Court case of *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154 made clear that, notwithstanding such clauses, a Malaysian court could not be ousted simpliciter from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not.

H

[92] In my view, critical to the choice of law and jurisdiction clause question is whether such a clause was in fact incorporated into the contracts between the parties.

I **[93]** I am satisfied and accept the plaintiff's assertion that the defendant's 'Open Country terms of trade' referred to in an internet link 'Please be advised that OCD has *modified* its Terms of Trade please consult the *attached terms*', that the 'modified' attached terms were in fact not attached to the sales contracts. As such, there can be no consensus to such a clause of choice of

jurisdiction. With no consensus, there is no question of:

(a) breach of the alleged clause to submit disputes to a New Zealand court; and/or

(b) the court condoning a breach of the parties' agreement.

[94] The defendant sought to explain that at the material time, the terms were not modified, but the link itself said the terms were modified and the purchaser (plaintiff in this case) is to 'consult the attached terms'. The plaintiff asserted that the terms were not attached. I do not think it is for this court at this stage to determine credibility when there is a contest on affidavits as to whether in fact the choice of law and jurisdiction clause was incorporated. I have not overlooked the cases of *World Triathlon Corp* and *Ajwa For Food Industries Co* cited by the defendant. In my respectful view, they are distinguishable in that the foreign jurisdiction clause were clearly in fact made part of the contract as contrasted to the case before the court.

[95] With the Supreme Court case of *American Express Bank Ltd v Mohamed Toufic Al-ozeir & Anor* [1995] 1 MLJ 160, as a guiding authority, when it boils down to which is the most appropriate forum to hear the dispute in question, I hold that the High Court of Malaya is the particular forum with which the action has the most real and substantial connection:

(a) the contract was made in Malaysia;

(b) the breach occurred in Malaysia;

(c) all or most of the relevant witnesses and evidence in the defective milk powder of approximately 1,068,375 mt (more than 1 million kg) are within the jurisdiction of this honourable court;

(d) the defendant has been paid a colossal sum of USD3,493,048.80 by the plaintiff who does not expect to get milk powder not fit for its purpose; whilst the fitness for purpose of the milk powder is properly a matter for trial, in considering this application, I have to assume the allegation is true, and having paid such a huge sum, to make the plaintiff yet incur stupendous expenses to ship back a million kg. of the products and fly its witnesses to New Zealand will in my view be rubbing salt into the wound; I have not overlooked that the defendant will also be put to expense if the matter is heard in the High Court of Malaya but at least it already has USD3,493,048.80 of the plaintiff's money;

(e) both New Zealand and Malaysia has a system of law with its foundation in the English common law system, inherited from being a part of the Commonwealth and case law made by decisions of the courts; there will be no earthshaking or material differences in the law system as such applicable to the sale of goods and contract law; and

(f) with Malaysia having an efficient court system that aims to dispose off each case within nine months from date of filing — an achievement and effort recognised by the World Bank, I have my doubts whether the defendant genuinely desires a trial in New Zealand, or was only seeking a procedural advantage there. On the facts available at this stage, the defendant's conduct in the change of address for service between the first service of the notice of writ and the second service and yet after the change of address, it continued to use the old address in the affidavits filed in this court calls into question the procedural advantages it attempts to seek and exploit.

[96] With a short waiting time for trial, and taking into consideration each of the above matters, none of which alone necessarily is determinative but together they present a persuasive picture, I am satisfied that 'it would be unjust to the plaintiff to confine him to remedies elsewhere'.

[97] I therefore hold that the Malaysian court has jurisdiction; the dispute is most closely connected to it, and is the most appropriate forum to hear the dispute as to meet the ends of justice.

[98] Enclosure 19 is dismissed with costs of RM6,000.

[99] I must not conclude without expressing my profound gratitude to Prof Datuk Gurdial Singh Nijar, Pek Chin Choo and Abraham Au who appeared for the appellant in Federal Court of Malaysia Civil Appeal No 02(i)-7–01 of 2019 (S) who had very kindly extended to me their striking intellectual discourse, notes and research in respect of the said appeal which I found extremely useful.

Enclosure 19 dismissed.

Reported by Ashok Kumar